Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COOPER TIRE & RUBBER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an agency can depart from its own established rulings and create, without explanation, two conflicting lines of precedent governing materially identical situations.

2. Whether a single implied "bargaining from scratch" threat in a union election campaign violates § 8(a)(1) of the National Labor Relations Act or warrants overthrowing a union election in the absence of any other unfair labor practices.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Cooper Tire & Rubber Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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JURISDICTION

The judgment of the Court of Appeals (App.1-24) was entered on August 24, 2005. A petition for rehearing was denied on February 7, 2006 (App. 46-47). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) provides:

> Unfair labor practices by employer. It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. §157].

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5) provides:

> Unfair labor practices by employer. It shall be an unfair labor practice for an employer— (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C. §159(a)].

STATEMENT OF THE CASE

A. *Introduction.* Petitioner Cooper Tire & Rubber Company ("Cooper") operates a warehouse facility in Cedar Rapids, Iowa. A Union representation election was conducted there by the National Labor Relations Board ("NLRB") on January 31, 2003 which was lost by the International Brotherhood of Electrical Workers Local 1634 ("Union") by a vote of 6 to 6. The Union filed an objection to the election based on a single statement regarding Cooper's 2002 "ROAM bonus" contained in a memorandum given by Cooper to eligible employees before the election. No unfair labor practice charges were filed by the Union over Cooper's pre-election conduct.

A three member panel of the NLRB, with Chairman Battista dissenting, found merit in the Union's Objection and directed a Second Election. App. 34-45. The Union won the Second Election by a 7 to 5 vote.

Cooper refused to bargain with the Union in order to challenge the NLRB's refusal to certify the results of the First Election. *Maremont Corp. v. NLRB*, 177 F.3d 573, 576 (6th Cir. 1999). The General Counsel issued a Complaint against Cooper for its refusal to bargain which Cooper

answered. After briefing by the parties, the NLRB issued a Decision and Order on March 25, 2004 finding that Cooper violated Section 8(a)(5) of the Act by unlawfully refusing to bargain with the Union. App. 25-33. This Order was upheld by the Sixth Circuit. App. 1-24.

B. *Cooper's ROAM Bonus Program.* The ROAM bonus is an annual bonus distributed to approximately 2,500 Cooper employees throughout the United States. All of Cooper's salaried employees, including all of the warehouse employees at Cedar Rapids, are entitled to the annual ROAM bonus so long as they are on the payroll as of December 31 of the year for which the bonus is awarded. App. 3–4. None of Cooper's unionized employees participate in the program. App. 4.

The "ROAM" acronym stands for "Return On Assets Managed." App. 3. ROAM is calculated by adding Cooper's pretax profit and income on interest; subtracting state and local taxes; and dividing that number by the average controllable assets of the Company. App. 3, fn.1. At the beginning of each year, Cooper sets a projected ROAM target that the Company strives to achieve by the end of the calendar year. App. 3. The ROAM bonus is based on how well Cooper performs in comparison to this goal and is awarded as a percentage of an eligible employee's salary. App. 3. Throughout the year, Cooper managers receive updates that compare actual performance to the ROAM goal. The actual ROAM bonus percentage is calculated after the final numbers for the year are compiled. App. 4.

The ROAM bonus is earned by eligible employees as of the end of the calendar year. App. 3–4. The ROAM bonus for each calendar year is not distributed to eligible employees until mid to late February of the subsequent year because

Cooper must calculate the actual bonus percentage after the close of the calendar year. App. 4. The bonus is distributed to all eligible employees on the same day as their paychecks and all employees receive the same percentage bonus.

The 2002 ROAM bonus was 6.2% of the eligible employees' base salaries. App. 4. This was significantly higher than the previous five years when the ROAM bonus ranged between 1.38% and 3.65%. App. 4. Cooper distributed the 2002 ROAM bonus to all eligible employees, including the warehouse employees at the Cedar Rapids facility, on February 21, 2003.

C. *Cooper's Pre-Election Statements On The ROAM Bonus.* During the pre-election period, Cooper prepared two question-and-answer memoranda for distribution to the eligible voters. One memorandum was distributed to employees on January 17, 2003; the other on January 27, 2003. App. 4. These memoranda addressed the major concerns expressed by employees concerning the upcoming election and educated the eligible voters on what it would mean if they voted in favor of a union. App. 4–9. The primary focus of Cooper's materials during this period was to convey how the collective bargaining process might impact wages and benefits, i.e. that wages and benefits could go up, down or remain the same. App. 5 and 15.

Cooper made clear to the eligible voters that, although wages and benefits would be subject to possible reduction through collective bargaining, Cooper could not take away wages and benefits simply because the employees voted for union representation. In the January 17, 2003 memorandum, Cooper specifically informed the eligible voters that it would be illegal for Cooper to take away wages or benefits if the

employees voted for union representation and that Cooper would not do this. The memorandum stated, in relevant part, as follows:

> If you voted the I.B.E.W. into Cooper Tire, *we wouldn't cut your wages or benefits simply because you voted in a union.* . . . The I.B.E.W. frequently tries to confuse this issue by raising a point (*the illegality of taking away things simply because a union is voted in*) which has nothing to do with the most important subject — the realities of collective bargaining.

(Exhibit 1 at March 4, 2003 N.L.R.B. Region 18 Hearing (Reg. Hr'g) Sixth Circuit App. pp. 0112-3.) (emphasis added).

The January 27, 2003 memorandum reiterated that, if the Union were voted in, Cooper could not change the employees' existing wages and benefits except through collective bargaining. App. 5. The January 27, 2003 memorandum also specifically mentioned the potential impact of collective bargaining on the ROAM bonus and emphasized the value of the bonus as an existing benefit. Reg. Hr'g Tr. 74, Sixth Circuit App. 0089. The only question and answer related to the ROAM Bonus stated:

> Question No. 22: If the IBEW gets in here, will we still be eligible for the ROAM Bonus?
>
> Answer: I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM. Cooper expects to announce the amount of the ROAM bonus for this year early next month. Early indications show that the ROAM bonus looks very promising this year.

App. 5.

Cooper made further reference to the ROAM bonus on two more occasions between the issuance of the memorandum and the January 31, 2003 election. On January 29, 2003, Cooper orally informed some of the eligible voters before they got off work that the anticipated ROAM bonus would be approximately 6%. (Reg. Hr'g Tr. 45, Sixth Circuit App. 0060.) On January 30, 2003, the day before the election, Cooper conducted a facility-wide meeting and informed the eligible voters that they could "count on" receiving a ROAM bonus of approximately 6.2% in mid to late February. App. 5. The oral communications with the employees were consistent with what Cooper did in prior years., i.e. inform employees of the approximate ROAM bonus percentage as soon as it became available. (Reg. Hr'g Tr. 47, Sixth Circuit App. 0062.) Cooper never linked the receipt of the 2002 ROAM bonus to the results of the election in any oral communication with the employees. (Reg. Hr'g Tr. 49, Sixth Circuit App. 0064)

D. *The NLRB Decision Directing a Second Election.* The first representation election was conducted on January 31, 2003. The warehouse employees did not select the Union as their certified bargaining representative. The tally of ballots showed a 6-6 tie. App. 6.

The Union timely filed two objections to the election, withdrawing one on February 20, 2003. App. 6, fn. 3. The remaining objection concerned Q&A #22, which the Union alleged was a threat to take away the 2002 ROAM bonus. The NLRB, with Chairman Battista dissenting, ultimately issued a Decision directing a Second Election based solely on its finding that an employee reasonably could interpret Q&A #22 as a threat to take away the 2002 ROAM bonus that the employees had already earned. App. 34-45. The Board

majority did not find an *explicit* threat, but instead found that employees "reasonably could infer" from Q&A #22 "that the receipt of the ROAM bonus was contingent upon the work force remaining nonunion." App. 38-39. Chairman Battista found that Q&A #22 unambiguously related to future eligibility for the ROAM bonus program and found further reinforcement for his position in Cooper's January 30, 2003, oral assurances the day before the election that employees could "count on" the 2002 ROAM bonus. App. 44-45.

REASONS FOR GRANTING THE PETITION

A. THE NLRB HAS CREATED TWO CONFLICTING LINES OF PRECEDENT GOVERNING MATERIALLY IDENTICAL SITUATIONS WHERE AN EMPLOYER MAKES A SINGLE, IMPLIED "BARGAINING FROM SCRATCH" THREAT IN A UNION ELECTION CAMPAIGN WITH NO OTHER UNFAIR LABOR PRACTICES.

Lawyers who regularly practice before the NLRB, whether on behalf of management or labor, will readily recognize and agree that:

> We have all had the experience at some point in our careers of researching a Taft-Hartley question only to find a hopeless morass or, better yet, two clearly divergent lines of authority. For example, the Board law on supervisors splits depending on whether the issue is the putative supervisor's inclusion in a bargaining unit, or whether his actions may be attributed to the employer for ULP purposes. A recent example that has provoked much judicial displeasure is the

> Board's determination as to whether cab drivers are independent contractors under the Act. In place of a reasoned, coherent analysis, reconcilable with existing Board law, we are offered up an unwieldy, multi-factored scramble. These cases remind me of Karl Llewelyn's quip to beginning law students that the way not to distinguish a precedent is to say something like "that case applies only to redheaded operators of magenta Buicks, not automobile drivers generally."
>
> Here, too, I would argue that adjudication with its narrow case focus encourages this type of fact-specific, subterranean policymaking.

Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163, 173 (1985).

This case presents just such an example of fact-specific, subterranean policymaking evocative of what the NLRB did in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 139 L. Ed.2d 797, 118 S. Ct. 818 (1998)

Prior to 1989, NLRB precedent was clear that a single implied threat to eliminate benefits made during a union election campaign, unaccompanied by other unlawful conduct, was not unlawful or sufficient to overturn the results of an election. This line of precedent was first identified as such by then Circuit Court Judge Stephen Breyer in *Shaw's Supermarkets, Inc. v. NLRB.*, 884 F.2d 34 (1st Cir. 1989) where the First Circuit reversed an NLRB decision inconsistent with this line of precedent. Undeterred, the NLRB on remand declined to acknowledge or explain its rationale. *Shaw's Supermarkets, Inc.*, 303 NLRB 382 (1991).

Yet, in the ensuing years, the NLRB has openly reaffirmed and twice more applied the inconsistent line of precedent from *Shaw's Supermarkets* — most recently in the instant case — each time resolutely refusing to acknowledge that it was doing so or to explain why the two lines of precedent were not inconsistent.

The instant case involves a single implied "bargaining from scratch" threat to eliminate an existing benefit, i.e., the ROAM bonus. *Shaw's Supermarkets* identifies the line of NLRB precedent — eight cases — which established that a single, implied threat to eliminate an existing benefit is *not* sufficient, standing alone, to warrant a new election. — *La-Z-Boy*, 281 N.L.R.B. 338 (1986); *Histacount Corp.*, 278 N.L.R.B. 681 (1986); *Clark Equipment Co.*, 278 N.L.R.B. 498 (1986); *Campbell Soup Co.*, 225 N.L.R.B. 222 (1976); *Ludwig Motor Corp.* 222 N.L.R.B. 635 (1976); *White Stag Manufacturing Co.*, 219 N.L.R.B. 1246 (1975); *Computer Peripherals, Inc.*, 215 N.L.R.B. 293 (1974); *Wagner Industrial Products Co.*, 170 N.L.R.B. 1413 (1968).

The First Circuit compared those eight cases with the fact situation in *Shaw's Supermarkets* and held:

> The record does not reveal any other elements suggesting regressive bargaining. Indeed, Board counsel at oral argument simply stated that he "did not know" just what it was in the context of the prior cases finding no violation that "made these same statements" benign there, yet harmful here. Counsel's statement, in our view, honestly reflects the circumstances, for we do not see how one can distinguish prior cases in which the Board found "no violation."

Shaw's Supermarkets, 884 F.2d at 39-40.

The Court then analyzed the cases where the NLRB had found a "bargaining from scratch" statement to violate the law, i.e., *Beverly Enterprises-Indiana, Inc.*, 281 N.L.R.B. 26 (1986); *Mississippi Chemical Corp.*, 280 N.L.R.B. 413 (1986); *Belcher Towing Co.*, 265 N.L.R.B. 1258 (1982); *Plastronics, Inc.*, 233 N.L.R.B. 155 (1977). With respect to these four cases, the Court wrote that:

> In almost all these cases, the "bargaining from scratch" speech was accompanied by other serious unfair labor practices, such as the discriminatory treatment of labor organizers. *See Beverly Enterprises-Indiana, Inc.*, 281 NLRB at 29 (statement "was made following the discriminatory transfer of the principal union activist"); *Mississippi Chemical Corp.*, 280 *N.L.R.B. 413* (several other unfair labor practices); *Belcher Towing Co., 265 N.L.R.B. 1258* (same). Here there were no other unfair labor practices committed. And in the cases finding violations, the language and context suggested, far more strongly than here, a threat to eliminate benefits before bargaining.

Shaw's Supermarkets, 884 F.2d at 40.

The Court concluded that the twelve cases analyzed:

> . . . draw a boundary between the lawful and unlawful. And, given that boundary, this case is not borderline, but, rather, lies tucked well within the boundary of the lawful.

Shaw's Supermarkets, 884 F.2d at 41.

The Court then explained how the Board should proceed in the future:

> In finding the Board's decision in this case inconsistent with its precedents, we do not intend to impose upon the Board the time consuming obligation of microscopically examining prior cases; nor to encourage counsel to examine past precedent with an eye towards raising hosts of legalistic arguments and distinctions. Here, however, the past cases trace a relatively clear line. Nor do we believe that past cases are a straitjacket, inhibiting experimentation or change. But, as we have explained, *supra* slip op. at pp. 7-10, the Board remains free to modify or change its rule; to depart from, or to keep within, prior precedent, as long as it focuses upon the issue and explains why change is reasonable. *See Atchison*, 412 U.S. at 808; *Baltimore Gas & Electric Co.*, 760 F.2d at 1418; *Operating Engineers*, 460 F.2d at 604. Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action. *See Atchison*, 412 U.S. at 808-09; *Local 777*, 603 F.2d at 872; *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976).

Shaw's Supermarkets, 884 F.2d at 41.

Far from heeding this suggestion, however, the NLRB has continued to do the same thing of which it was guilty in *Shaw's Supermarkets*. Notwithstanding the Court's careful

analysis of Board precedent in *Shaw's Supermarkets*, the NLRB stated on remand that "with due respect to the Court, we continue to believe that, under the law, conduct like that involved herein is unlawful." Then as now, the NLRB gave no explanation of why it believed the First Circuit's analysis of the twelve cases was incorrect. *Shaw's Supermarkets, Inc.*, 303 N.L.R.B. 382 (1991).

Subsequent to its decision on remand in *Shaw's Supermarkets*, the Board has continued to treat its decision in *Shaw's Supermarkets* as good law and has ruled in two additional cases that a single implied threat in a "bargaining from scratch" statement without any additional unfair labor practices was unlawful. In *Exxon Research and Eng'g Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996), the NLRB held that a statement by the company during a union campaign that bargaining will begin "with a blank check" constitutes an unlawful threat to engage in regressive bargaining. The company engaged in no other objectionable conduct. The Fifth Circuit refused to enforce the Board's Order, citing *Shaw's Supermarkets*. The Court stated that:

> . . . As our opinion today makes clear, the statements were made in circumstances free from other unfair labor practices. In addition, there is no evidence in the record that Clements' statements were coupled with other statements or company conduct that would suggest to a reasonable audience that the companies intended to eliminate benefits before bargaining.

Exxon Research, 89 F.3d at 233.

The NLRB did the same thing in the instant case in 2003. Specifically, the NLRB directed a Second Election in *Cooper* based solely upon its finding that an employee reasonably could interpret Q&A #22 as a threat to take away the 2002 ROAM bonus if the Union won the election. App. 38. No one disputes that Cooper engaged in no other unlawful or objectionable conduct. Yet, the very cases cited by the NLRB in its Decision directing a Second Election all involved either multiple threats to eliminate benefits or a single threat accompanied by other objectionable conduct, factors not present in either *Cooper* or *Shaw's Supermarkets*. *Hertz Corp.*, 316 N.L.R.B. 672 (1995) (threat with other objectionable conduct); *Advo System, Inc.*, 297 N.L.R.B. 926 (1990) (threat with other conduct); *Yuma Coca-Cola Bottling Co.*, 339 N.L.R.B. 67 (2003) (direct threat followed by multiple implied threats); *Plastronics*, 233 N.L.R.B. 155 (1997) (multiple unequivocal threats); *Georgia-Pacific Corp.*, 325 N.L.R.B. 867 (1998) (multiple unequivocal threats).

Indeed, *Plastronics* was cited by the First Circuit to distinguish the direct and multiple threats in that case with the implied, single threat in *Shaw's*. Yet the NLRB used the multiple direct threats in *Plastronics* to justify its finding in *Cooper* involving a single implied threat and said nothing about the eight cases cited in *Shaw's Supermarkets* where a single, implied threat was not found to be unlawful. Instead, as it did in *Exxon Research*, the NLRB offered no reason why the single equivocal threat allegedly contained in Q &A #22, standing alone, warranted a Second Election when its past decisions cited in *Shaw's Supermarkets* held to the contrary.

The NLRB would like to pretend the Circuit Court decisions in *Shaw's Supermarkets* and *Exxon Research* don't exist. Unfortunately, both cases were recently cited in a dissent (Member Brame) in *Noah's Bay Area Bagels, LLC*, 331 N.L.R.B. 188 (2000) and, in its Opinion, the majority, therefore, distinguished *Shaw's Supermarkets* and *Exxon Research* from what it believed to be the fact situation present in *Noah's Bay Area Bagels*. It did so using the same rationale in *Shaw's Supermarkets* and *Exxon Research* that the employers in those cases had not committed "other serious unfair labor practices." This is evidence that the NLRB at least understand the basis for the First Circuit's decision in *Shaw's Supermarkets*. Yet the NLRB made it clear that it did not accept the reasoning in those two cases ("even if we were to accept the reasoning of those Circuit Court decisions . . ."). *Noah's Bay Area Bagels*, 331 N.L.R.B. at 188. Just as with its decision on remand in *Shaw's Supermarkets*, the Board offered no explanation whatsoever of why it did not "accept the reasoning" of the First Circuit's opinion in *Shaw's Supermarkets*. Nor did the NLRB acknowledge that it had created two inconsistent lines of authority.

The NLRB's decision in *Cooper*, combined with *Shaw's Supermarkets* and *Exxon Research*, clearly shows two conflicting lines of precedent governing materially identical situations where an employer makes a single implied "bargaining from scratch" threat in a union election campaign otherwise free of additional unfair labor practices or other objectionable conduct. One line of NLRB cases — *Shaw's Supermarkets*, *Exxon Research* and *Cooper*— holds it illegal. A second line of eight NLRB cases identified and analyzed in *Shaw's Supermarkets* holds to the contrary. Despite four opportunities to do so — *Shaw's Supermarkets* on remand, *Exxon Research*, *Noah's Bay Area Bagels*, and

Cooper — the Board resolutely refuses to acknowledge, reconcile or otherwise explain these two inconsistent lines of authority.

The NLRB had another opportunity to do so in the instant case at the appellate court level but its lawyers didn't rise to the challenge. Instead, the NLRB lawyers defended their client's decision in *Cooper* by citing a series of cases dealing with everything *but* implied threats to eliminate an existing benefit. They cited, for example, *NLRB v. Island Film Processing Co.*, 784 F.2d 1446, 1453 (9th Cir. 1986) (supervisors who initiated union campaign engaged in continuous threats and comments to employees throughout each day leading up to the election, including threats of job loss); *Taylor Wharton Div. Harsco Corp.*, 336 N.L.R.B. 157, 157 (2001) (threats of plant closure and job loss); *Mariner Post-Acute Network, Inc.*, 329 N.L.R.B. 3, 3-4 (1999) (direct threat of job loss); *Laidlaw Transit, Inc.*, 297 N.L.R.B. 742, 742 (1990) (direct threat of mass layoff); *UFORMA/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1288-89 (6th Cir. 1997) (direct threat to eliminate an entire shift); and *Concepts & Designs*, 318 N.L.R.B. 948, 948 (1995) (direct threat of discharge and two discharges).

The NLRB's refusal to even acknowledge, let alone explain, the inconsistency between the two lines of precedent make it more difficult to judicially review its fact-specific subterranean policymaking in this area. It is akin to what the NLRB did in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 139 L. Ed.2d 797, 118 S. Ct. 818 (1998). There, the NLRB had held that an employer had not established a "good faith doubt" as to a union's majority status by a "preponderance of the evidence." But the NLRB did not apply in *Allentown Mack Sales* the good faith doubt

and preponderance of the evidence standards as it claimed. Instead, the NLRB applied in *Allentown Mack Sales* — and had long been applying — a standard of *express repudiation* by a majority of the bargaining unit along with a "clear and convincing" standard for evidence rather than the stated standards.

The Supreme Court found that this was disguised policymaking using the back door of fact-finding and burdens of proof:

> As a theoretical matter (and leaving aside the question of legal authority), the Board could certainly have raised the bar for employer polling or withdrawal of recognition by imposing a more stringent requirement than the reasonable-doubt test, or by adopting a formal requirement that employers establish their reasonable doubt by more than a preponderance of the evidence. Would it make any difference if the Board achieved precisely the same result by formally leaving in place the reasonable-doubt and preponderance standards, but consistently applying them as though they meant something other than what they say? We think it would.
>
> * * *
>
> An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding.

Allentown Mack Sales, 522 U.S. at 373-374 and 376.

Something very similar has occurred in the *Shaw's Supermarkets*, *Exxon Research*, and *Cooper* line of cases where the NLRB has created a line of precedent involving single implied threats in election campaigns inconsistent with the line of precedent identified in *Shaw's Supermarkets*. The NLRB has refused to acknowledge or explain what it is doing or how it believes the line of precedent in *Shaw's Supermarkets* can be squared with what it did in *Shaw's Supermarkets* and *Exxon Research* (decisions it reaffirmed in 2000 in *Noah's Bay Area Bagels*) and *Cooper*.

B. A CONFLICT EXISTS AMONG THE CIRCUITS WITH RESPECT TO THE NLRB'S TWO CONFLICTING LINES OF PRECEDENT GOVERNING SITUATIONS WHERE AN EMPLOYER MAKES A SINGLE, IMPLIED "BARGAINING FROM SCRATCH" THREAT IN A UNION ELECTION CAMPAIGN WITH NO OTHER UNFAIR LABOR PRACTICES.

The Sixth Circuit's decision in this case is in direct conflict with the First Circuit's decision in *Shaw's Supermarkets* as well as the Fifth Circuit's decision in *Exxon Research*.

In its opinion below in *Cooper*, the Sixth Circuit fared no better than the NLRB in providing a rationale for what the NLRB had done. Rather than rely on the NLRB's own opinion and the cases cited by it, the Sixth Circuit cited four other cases to bolster its otherwise unexplained position that the *Shaw's Supermarkets* decision is distinguishable from the facts in *Cooper*.

The four cases are *Siemens Mfg. Co.*, 322 N.L.R.B. 994 (1997); *UFORMA/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997); *V&S ProGalv, Inc. v. N.L.R.B.*, 168 F.3d 270 (6th Cir. 1999); and *NLRB v. Island Film Processing Co.*, 784 F.2d 1446 (9th Cir. 1986). None of those four cases bear any factual similarity to the fact situation presented in *Shaw's Supermarkets* and *Cooper*, i.e, a single implied "bargaining from scratch" statement unaccompanied by any other unfair labor practices or unlawful conduct.

The Sixth Circuit, citing *Siemens*, stated "there is authority supporting the Board's finding that a single, implied threat of retaliation is sufficient to taint an election." App. 11. The Court also stated, citing the three other cases mentioned above, that "a veiled threat of retaliation is sufficient evidence that an employer interfered with the employees' exercise of their rights in the context of a Union election." App. 11. The Sixth Circuit erred in relying on these four cases. Each is distinguishable from the facts in *Shaw's Supermarkets* and *Cooper* as discussed below.

Siemens. During a union campaign, the president of the Siemens facility stated that: "If the Union wins...during that [first] year, everything including wages, is frozen until we reach an agreement at the negotiating table." *Siemens*, 322 N.L.R.B. at 994. The president's threat was not "implied" nor was it "veiled." Indeed, the Board recognized it as a direct threat: "...his statements indicate that he would unilaterally change his past practice of granting the raises and bonuses by freezing them." *Id.* Unlike Cooper's facts, where the Board thought that an employee *might* construe the statement in question as putting his current bonus in jeopardy by voting in the union, the *Siemens* case involved *a direct statement* that raises and bonuses *would* be frozen. Not only did the

Board stretch logic to find that the Question and Answer at issue in *Cooper* might be construed as a threat, Cooper explicitly stated that it would be unlawful for Cooper to unilaterally change wages or benefits in retaliation for the union winning the election. The distinctions are critical.

UFORMA. In this case, the Manager of Human Resources, in response to employees questioning her on unionizing the employer, told the employees that "you better back off; if you push [the] situation [petitioner] could take the work elsewhere." *UFORMA*, 111 F.3d at 1295. When asked whether this was a threat, the HR Manager said "that's the way these people do business." *Id.* She also said they "should really kind of back off" on the unionizing and "you know how these people are." *Id.* Though the NLRB found these statements to be "veiled" threats, in reality the statements were explicit, especially where compared to the implied threats in *Cooper* and *Shaw's Supermarkets*. Calling a direct threat "veiled" doesn't make it so. Furthermore, unlike *Shaw's Supermarkets* and *Cooper*, there were no assurances from the employer that the employer would act lawfully. Cooper not only generally assured its employees that it would act lawfully, it also explicitly stated that the Company could not unilaterally change wages or benefits if the union won the election.

V&S ProGalv. The Sixth Circuit's citation to this case is even more off-base. Unlike *Cooper*, the statement was made in the context of several other unfair labor practices. Specifically, the NLRB held that the employer committed unfair labor practices by: 1) "instigating and soliciting the employee drafting and circulation of a petition seeking decertification of the Union"; 2) promising employees an additional benefit if they rejected the Union; and

3) unlawfully interrogating an employee regarding his union involvement. *V&S ProGalv*, 168 F.3d 270. Further, the employer's statement was more a direct threat than an implied threat. Specifically, the NLRB found unlawful a manager's explicit comment that the employer "would lock the doors on this place and they [the employees] could kiss the investment fund [an employee benefit] good bye." *Id.* at 278 A direct prediction of the employer closing a plant if the union won is hardly "implied" or "veiled," especially when made in the context of other serious unfair labor practices not present in *Shaw*'s *Supermarkets* or *Cooper*. It is cold comfort to an employer when the NLRB plays fact-finding word games of this nature that, as this Court has noted, the NLRB's "decisions have no permanent deleterious effect on the English language." *Allentown Mack Sales*, 522 U.S. at 368.

Island Film. Even further from the topic at hand is the Sixth Circuit's citation to *Island Film*. In *Island Film* the Ninth Circuit overturned an election based on active supervisory participation in a union organizing campaign. A supervisor had told employees that: "the job would be rougher if [they] didn't vote"; that he "saw good things about [the Union]"; "[the Union] would help us to have job security"; "the company wouldn't be able to just take away paid vacations"; and more such comments. *Island Film*, 784 F.2d at 1448-1449. The Ninth Circuit concluded that "actual proof of coercion" in such a case is not required to overturn an election; the supervisory activity needs to only "reasonably tend" to coerce or be "likely to impair" an employee's choice. The court's conclusion based on these statements from supervisors is hardly surprising and, of course, has nothing to do with *Shaw's Supermarkets* or *Cooper*. Instead, the Sixth Circuit notes what amounts to a throw-away cite by the Ninth

Circuit which states: "Implied threats of retaliation suffice to taint an election. *See Wright Memorial Hospital [v. NLRB]*, 771 F.2d [400] at 404 [8th Cir. 1985]; *Worley Mills, Inc. v. NLRB*, 685 F.2d 362, 365 (10th Cir. 1982); *Fall River Savings Bank [v. NLRB]*, 649 F.2d [50] at 57 [1st Cir. 1981]." *Island Film*, 784 F.2d at 1451. The statement and cites seem out-of-place in the *Island Film* decision. *They are never explained by the court*. Moreover, the string-cited cases in *Island Film* have nothing to do with statements like those in *Shaw's Supermarkets* or *Cooper*. The three cases cited in *Island Film* all simply repeat the oft-cited proposition that the presence of pro-union supervisors, by itself, is not enough to overturn the results of an election. Instead, there must also be a showing of express or implied threats that tend to be coercive. Neither *Shaw's Supermarkets* nor *Cooper* dealt with pro-union supervisors whose actions were reasonably coercive. The Sixth Circuit's citation to cases involving unrelated facts involving an unrelated test is misplaced.

The fact situations in *Shaw's Supermarkets*, *Exxon Research* and *Cooper* are substantially similar if not materially identical in that each involved a single "bargaining from scratch" threat unaccompanied by other objectionable or unlawful conduct.

The conflict among the Circuits is likely to become greater given the NLRB's resolute refusal to acknowledge, reconcile or explain the conflicting lines of precedent it has created with, on the one hand, the eight cases analyzed by the First Circuit in *Shaw's Supermarket* and, on the other hand, the NLRB's opinion in *Shaw's Supermarket* on remand, its decision in *Exxon Research*, its reaffirmation of those two decisions in *Noah's Bay Area Bagels*, and its decision in *Cooper*.

Significantly, both the Seventh Circuit in *Milwaukee and Southeast Wisconsin District Counsel of Carpenters v. Rowley-Schlimgen*, 2 F.3d 765 (7th Cir. 1993) and the Ninth Circuit *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905 (9th Cir. 1990) have cited *Shaw's Supermarkets* with approval.

C. DIRECT APPLICATION BY THE SUPREME COURT OF *ATCHISON* TO THE NLRB DECISION IN THIS CASE IS NECESSARY TO CURB ITS REPEATED DEPARTURES FROM REASONED DECISIONMAKING.

This case presents an issue of broad and immediate public importance extending beyond the questions presented. It is, in many respects, a logical extension of this Court's decision in *Allentown Mack Sales v. NLRB*.

Professor Estreicher observed in 1985 that:

> Increasingly, the Board is not looked upon as a stable agency, and its rules not viewed as a stable body of law that must be consulted for organizing one's labor affairs. . . .
>
> Policy oscillation at the Labor Board bespeaks a pathology, and one associated with the Board's virtual exclusive reliance on adjudication as the vehicle for policy formation.

Estreicher, *supra* at 170.

Nothing has changed in the subsequent twenty years. While Professor Estreicher urged rulemaking as a cure for the problem, the NLRB has continued to opt for adjudication. Such a choice, this Court has held, is largely within the NLRB's discretion. *NLRB v. Bell Aerospace*, 416 U.S. 267, 294; 40 L. Ed.2d 134, 94 S. Ct. 1757 (1974).

As a consequence of the NLRB's insistence on using adjudication as the exclusive vehicle for policymaking, the following description from Professor Estreicher continues to accurately characterize the NLRB's decisions then and now:

> Although the Board was established to provide expertise, to found the processes of factfinding and rule formulation on an expert understanding of the significance of particular facts and appreciation of the necessary framework for meaningful employee choice and effective collective bargaining, this agency's approach is typically intuitionistic and excessively doctrinal. Rather than providing a basis for decisions that only a supposedly expert agency could make — by evaluating the available empirical, economic literature and systematically distilling the accumulated experience of Board personnel and of the labor relations community generally — the Board acts as a kind of Article I "Talmudist" court, parsing precedent, divining the true meaning of some Supreme Court ruling, and balancing in some mysterious fashion competing, yet absolute-sounding values.

Estreicher, *supra* at 172.

As a direct consequence of this approach, NLRB decisions often take on a surreal context which Lewis Carroll would readily appreciate.

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be the master, that's all."

L. Carroll, *Through the Looking-Glass and What Alice Found There*, Chapter 6.

This attitude explains how, over time, the NLRB can morph "preponderance" of the evidence into "clear and convincing" or render meaningless the distinction between "direct" and "veiled" threats. But Humpty Dumpty should not, in most circumstances, serve as a role model for federal agencies subject to the requirement of reasoned decisionmaking.

As this court observed in *Allentown Mack Sales*:

> But adjudication is subject to the requirement of reasoned decisionmaking as well. It is hard to imagine a more violent breach of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly mend it.

Allentown Mack Sales, 522 U.S. at 374.

The semantic problem addressed by this Court in *Allentown Mack Sales* is not an isolated one. In fact, it is a systemic problem inherent in the political nature of the NLRB and often leads, as it has in this case, to the labor law practitioner's familiar dilemma of two clearly divergent lines of authority.

Academics uniformly endorse a characterization of the NLRB as a political body, not overly burdened by any particular expertise. Hence, while appellate courts routinely accord deference to the NLRB due to its supposed policymaking expertise, academics pay it little respect. *See*, e.g., Professor Joan Flynn who once worked on the staff of an NLRB member and wrote:

> "In arriving at its conclusions about industrial reality, the Board does not make use of empirical data or otherwise draw on the practical knowledge of outside experts or even of its own field staff. . . . The Board's opinions frequently do not bear the signs of any particular expertise."

Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 Boston Univ. L. Rev. 387, 427-29 (1995).

Professor Flynn has noted the politicization of the NLRB as one reason for its poor performance:

> "Partisan appointees [at the NLRB] of the last fifteen years have, according to the empirical data, been so much more one-sided in their voting then were their predecessors from similar backgrounds . . ."

Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio St. L. J. 1361 (2000).

While Professor Flynn suggests the politicization is a recent phenomenon starting with the Reagan era, it all depends upon what data is reviewed. Others have noted that the phenomenon of a politicized NLRB is not of recent vintage. *See*, e.g., William N. Cooke & Frederick H. Gautschi III who presented an empirical study of NLRB decisions in selected unfair labor practices cases from 1954 to 1977 to prove that the decisions of NLRB members depended upon whether a Democratic or Republican President appointed them. Cooke & Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 Indus. & Lab. Rel. Rev. 539 (1982). Robert D. Brownstone decried politicization by the Reagan-era NLRB in *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 Brook. L. Rev. 229, 276-80 (1986). A more recent article by Claire Tuck listed five cases from 2004 where the Bush NLRB overruled new precedent the Clinton-era NLRB had established. Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Common Rulemaking*, 27 Cardozo L. Rev. 1117, N. 40.

And, of course, Congress periodically holds hearings and declares itself just as "shocked" to find politicization in NLRB decisions as was Captain Renault to discover gambling at Rick's Cafe in the film *Casablanca*. The most recent manifestation of this occurred in 2000 where the Subcommittee on Employer-Employee Relations of the House Committee on Education in the Workforce heard testimony that, in the final months of the Clinton administration, the Clinton NLRB overturned major precedents in at least seven cases. *The National Labor Relations Board: Recent Trends and Their Implications: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 106th Cong. 81-125 (2000).

Indeed, one can search the literature in vain for comparable articles defending the consistency, probity, expertise or non-partisan nature of the NLRB whether the authors be pro-labor, pro-management, or genuinely neutral. What one *will* find are articles suggesting that the NLRB deserves far less deference than appellate courts routinely give it. Ursula M. McDonnell, *Deference to NLRB Adjudicatory Decision-making: Has Judicial Review Become Meaningless?*, 58 U. Cin. L. Rev. 653, 659-67 (1989).

That the NLRB is, and always has been, political should not be surprising given that both parties follow the long-standing tradition which provides that three of its members will be from the President's party and the other two members will be from the opposing party. But the NLRB's reputation should not be as poor as it is, notwithstanding its politicization. In many respects the NLRB has only itself to blame and one of the primary reasons for its poor reputation is its consistent failure to adhere to the dictates of this Court's decision in *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 37 L. Ed. 2d 350, 93 S. Ct. 2367 (1973) which essentially held that an agency must either follow its own precedents or explain why it departs from them. An agency is free to depart from prior norms under many circumstances, the Court explained, but further stated that:

> Whatever the ground for departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate. . . .

> [If] the agency distinguishes earlier cases[, it must] assert[] distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing.

Atchison, Topeka & Santa Fe Railway Co., 412 U.S. at 808-09.

This Court did not cite to *Atchison* in reversing the NLRB in *Allentown Mack Sales*. It was not necessary to do so because, by that time, the damage had already been done. But Cooper submits that, had the NLRB been consistently required by this Court and the Courts of Appeal to "assert distinctions that . . . , in the context of the entire opinion of the agency, reveal the policies it is pursuing" the NLRB would never have reached the pitiful point it did in *Allentown Mack Sales* when it was reduced to arguing "preponderance" meant "clear and convincing" because that's what its decisions had said for the past ten or fifteen years.

Similarly, had the NLRB on remand in *Shaw's Supermarkets* not brushed off the First Circuit with a "we respectfully disagree" but rather had explained why it believed the First Circuit's analysis was flawed, it might never have created the *Shaw's Supermarkets*, *Exxon Research*, and *Cooper* line of precedent which conflicts with the eight cases analyzed in *Shaw's Supermarkets*.

As one appellate court has noted: "An inadequately explained departure solely for purposes of a particular case, or the creation of conflicting lines of precedent governing the identical situation, is not to be tolerated." *NLRB v. International Union of Operating Engineers, Local 925*, 460

F.2d 589, 604 (5th Cir. 1972). Cooper submits that is precisely what the NLRB has done in this case, i.e., created two conflicting lines of precedents governing materially identical situations. The reason why is that the NLRB is at its core a political agency with little genuine expertise. That is why it did not adhere to its obligations imposed by *Atchison* and explain itself on remand in *Shaw's Supermarkets*. The First Circuit's detailed analysis had placed it in a box and it saw no way out. Instead, the NLRB stubbornly insisted it was right in *Shaw's Supermarkets* the first time and declined to say why to which the only reply can be: well, it would, wouldn't it?

Since then, the NLRB has proceeded to compound its mistake in *Exxon Research*, *Noah's Bay Area Bagels*, and *Cooper*. The decision in *Noah's Bay Area Bagels* is especially instructive because it demonstrates that all three NLRB members on that panel well knew the distinction the First Circuit and Fifth Circuit had drawn between the NLRB line of cases involving single implied threats with those involving threats combined with additional unlawful conduct. Yet they still declined to reconcile *Shaw's Supermarkets* and *Exxon Research* to the eight cases analyzed by the First Circuit in *Shaw's*.

The NLRB ought to have been embarrassed when this Court exposed it as no better than Humpty Dumpty in *Allentown Mack Sales*. But the NLRB has not changed its political spots or stripes — take your pick. If the NLRB intends to continue its adjudicatory policymaking — which it obviously does — then this Court needs to reaffirm that *Atchison* indeed applies to the NLRB and the Courts of Appeal need to more rigorously apply that standard to NLRB decisions rather than meekly defer to an expertise that no

serious academic believes the ever-changing politically appointed members of the NLRB possesses. Had that been done in the past, Cooper submits that neither *Allentown Mack Sales* nor the instant case would have reached this Court.

But unless that is done, the NLRB has clearly signaled its intent to maintain two divergent lines of authority on the materially same situation. Accordingly, there will continue to be a line of cases from the NLRB which some Circuits will refuse to enforce unless this Court grants Cooper's petition in this case and reaffirms a precedent — *Atchison* – – that the NLRB cannot decline to follow — respectfully or otherwise.

CONCLUSION

For the foregoing reasons, Cooper respectfully requests that their Petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT FROM THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Nos. 04-1425, 04-1590

Filed: August 24, 2005

COOPER TIRE & RUBBER COMPANY,

Petitioner/Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT FROM THE NATIONAL LABOR RELATIONS BOARD

Before: BATCHELDER and COLE, Circuit Judges, and OBERDORFER,* District Judge.

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* The Hon. Louis F. Oberdorfer, United States District Court for the District of Columbia, sitting by designation.

Appendix A

OBERDORFER, District Judge. Petitioner, Cooper Tire & Rubber Co. ("Cooper"), seeks review of the March 25, 2004 Decision and Order of the National Labor Relations Board (the "Board") finding that Cooper violated Section 8(a)(5) of the National Labor Relations Act, as amended 29 U.S.C. § 158(a)(5), by unlawfully refusing to bargain with the International Brotherhood of Electrical Workers Local 1634 (the "Union"). *See Cooper Tire & Rubber Co.*, 341 N.L.R.B. No. 64, 2004 WL 670822 [hereinafter 2004 Order]. The Board cross-petitions for enforcement of the 2004 Order.

Cooper refuses to recognize the Union as the representative of the employees at its Cedar Rapids, Iowa, facility, alleging that the Board's certification of the Union as the exclusive bargaining representative was based on the results of an improperly ordered December 3, 2003 election. Instead, according to Cooper, the Board should have certified the results of a January 31, 2003 election, in which the Union failed to attain majority support. Following the January 31, 2003 election, the Union filed an objection, alleging that Cooper engaged in misconduct by threatening employees with the loss of a significant bonus if they voted to unionize. A hearing officer, after a hearing on the objection, agreed with the Union, finding that Cooper's preelection conduct violated Section 8(a)(1) of the Act. The Board adopted the hearing officer's findings *in toto*, invalidated the election and directed a second election. *See Cooper Tire & Rubber Co.*, 340 N.L.R.B. No. 108 2003 WL 22465848 [hereinafter 2003 Order]. The Union received majority support in the second election, which the Board certified over Cooper's objections.

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Because we find that substantial evidence supported the Board's finding that Cooper's conduct before the January 31, 2003 election violated Section 8(a) (1) of the Act, and its finding that Cooper failed to bargain in good faith after the Board certified the results of the properly ordered second election, we deny Cooper's petition for review and grant the Board's cross-petition for enforcement.

I.

Cooper is a Delaware corporation with its principal place of business in Findlay, Ohio. Cooper manufactures and distributes to customers, tires and other rubber equipment for passenger and commercial vehicles. Cooper operates four warehouses, including one in Cedar Rapids, Iowa, where it employees a General Manager, Todd Lemke, three other supervisors, and twelve warehouse employees.

A. The ROAM Bonus Program

Among other employee benefits, Cooper maintains an annual employee bonus program known as the "ROAM" bonus (an acronym for Return on Assets Managed). At the beginning of each year, Cooper sets a projected ROAM target;[1] the ROAM bonus is based on how well Cooper performs in comparison to this goal and is awarded as a percentage of an eligible employee's salary. All of Cooper's salaried employees, including all of the warehouse employees at its Cedar Rapids facility, who are on the payroll on

1. Cooper calculates the ROAM by adding Cooper's pretax profit and income on interest, subtracting state and local taxes, and dividing that number by Cooper's average controllable assets.

December 31 of the year in which the bonus is earned are eligible to participate in the ROAM bonus program. None of Cooper's unionized employees participate in the program. The bonus is distributed to all eligible employees in mid- to late February of the subsequent year, following a vote of Cooper's Board of Directors approving the amount of the bonus. The amount of the ROAM bonus varies each year. For example, for the years 1997-2001, the bonus ranged between 1.38% and 3.65% of eligible employees' base salaries. The 2002 bonus was significantly higher at 6.2%.

B. Pre-election Activity

On December 22, 2002, the Union filed a petition to represent the full-time regular and part-time warehouse employees at Cooper's Cedar Rapids facility. Pursuant to a stipulated election agreement, the Board-conducted election was scheduled for January 31, 2003. During the pre-election period, employees questioned Cooper's management about the effect union representation would have on their wages and benefits, including the ROAM bonus. For example, in mid-January, 2003, one employee asked the general manager, Todd Lemke, if employees would receive the 2002 ROAM bonus if the Union gained majority support. Lemke privately assured the employee that all those eligible would receive the 2002 bonus regardless of the outcome of the election. Subsequently, in response to this and other questions, Cooper prepared two question-and-answer memoranda for distribution to all eligible voters. One memo was distributed on January 17, 2003; the other on January 27, 2003. According to Cooper, the memoranda addressed the major concerns expressed by its employees about the impending election.

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The January 17 memorandum included questions and answers pertaining to the voting and bargaining processes, and the potential effect of unionization on job security, work schedules and the number of sick days allowed. One of the questions asked whether employees could lose benefits if the Union won the election. In response, Cooper stated that although wages and benefits could not be cut "simply because you voted in a union," employees could "end up with lower wages or elimination of benefits or privileges because of collective bargaining."

The January 27 memorandum contained twelve additional questions and answers dealing with such topics as who would negotiate for the unionized employees, what a steward's role would be, and how long collective bargaining for the first contract might take. The final question ("Question 22") addressed eligibility for the ROAM bonus. Specifically, the question and answer read as follows:

> Question 22: If the IBEW gets in here, will we still be eligible for the ROAM bonus?
>
> Answer: I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program. Cooper expects to announce the amount of the ROAM bonus for this year early next month. Early indications show that the ROAM bonus looks very promising this year.

When Cooper distributed the January 27 memorandum, although Cooper's employees had earned the 2002 ROAM

bonus, the employees had not received the bonus, nor had Cooper's Board of Directors given its final approval to the amount of that bonus.

Shortly either before or after the issuance of the January 27 memorandum, but before the January 31, 2003 election,[2] Lemke held a meeting of Cedar Rapids warehouse employees during which he informed the voting employees that the 2002 ROAM bonus was expected to be around 6.2%, subject to the Board of Directors' approval. Specifically, Lemke stated "you can count on 6-ish payable . . . mid- to late February." Lemke made no statements with respect to the affect of the Union vote on receipt of the 2002 bonus.

On January 31, 2003, the Board conducted the election. Six Cedar Rapids employees voted for unionization and six against, with no challenged ballots. Because the Union failed to attain majority support, the Board did not certify it as the collective bargaining representative. The Union filed an objection to the voting results, contending that a new election should be held for the Cedar Rapids facility because Cooper unduly influenced the result of the first election by threatening voting employees with the loss of the 2002 ROAM bonus if they elected to unionize.[3]

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2. The evidence as to the exact date of the facility-wide meeting is mixed. Given the state of the record, the hearing officer declined to determine when the meeting occurred. Similarly, in its 2003 Order, the Board did not make a finding on the question of when the meeting took place, concluding that the answer to that question was not material to the outcome of the case.

3. The Union initially filed two objections to the election but withdrew one on February 20, 2003.

C. Board Review of Initial Election

A hearing officer conducted a hearing on the Union's objection on March 4, 2003. Thereafter, he issued a report and recommendation in which he found merit to the Union's objection and recommended that the result of the election be set aside. In reaching that conclusion, he found that Question 22 was objectionable because it reasonably would have led employees to believe that receipt of the 2002 bonus was in jeopardy if they voted to unionize. He rejected Cooper's arguments that employees could only understand the statement in the January 27 memorandum as referring to future bonuses (*i.e.* those earned in 2003 and thereafter), rather than all ROAM bonuses (including the 2002 bonus). He concluded that the Union was not required to introduce evidence that employees actually believed that their 2002 ROAM bonus was contingent on the outcome of the election, noting that "[t]he test is whether employees reasonably would believe that they could lose an existing benefits as a result of unionization, not the actual effect on the employees." Furthermore, the hearing officer found that Lemke's statement to employees at the facility-wide meeting concerning the 2002 bonus did not repudiate or clarify the objectionable conduct because it "did not clearly indicate that the bonus would be paid to the unit employees regardless of the election." Finally, the hearing officer found that "although [Cooper] explicitly informed 1 unit employee that the 2002 ROAM bonus would be paid to employees regardless of the outcome of the election, this left the remaining 11 unit employees unclear as to what would happen, in circumstances where a single-vote shift could have affected the outcome of the election."

Cooper sought Board review of the hearing officer's report and recommendation. On October 28, 2003, the Board adopted the hearing officer's finding of employer interference and directed a second election.[4] In accordance with its 2003 Order, the Board conducted a second election on December 3, 2003. This time, the Union prevailed by a vote of seven to four, with one challenged ballot going uncounted. Shortly thereafter, in the absence of any objections to the second election, the Regional Director certified the Union as the exclusive bargaining representative of Cooper's Cedar Rapids facility warehouse employees.

D. Board Review of Cooper's Refusal to Bargain After Second Election

After its certification, the Union requested that Cooper commence bargaining. Cooper refused and the Union filed an unfair labor practice charge. On March 25, 2004, the Board issued a second Decision and Order, finding that Cooper's refusal to bargain with the Union violated Sections 8(a)(5) and 8(a)(1) of the Act. The Board concluded that all representation issues raised by Cooper in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding. This timely appeal followed.

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4. Chairman Battista dissented, disagreeing with the majority's findings that Question 22, taken in context, was sufficiently coercive to have a reasonable tendency to interfere with the employees' free choice. On the contrary, he found that "the employees reasonably understood that they definitely would receive a bonus for 2002, and that if the Union were selected future bonuses would not necessarily be given."

Appendix A

II.

On appeal, Cooper argues that it has no duty to bargain with the Union because the Union's certification as the exclusive bargaining representative was based upon the results of an improperly-ordered second election.[5] Specifically, Cooper claims that the Board erred as a matter of law in its 2003 Order because: (1) the Board departed from its own precedent without explanation in ruling that a single, implied threat to take away an existing benefit was sufficient to overturn the results of a valid election; and (2) substantial evidence does not support the Board's finding that Question 22, viewed in the context of Cooper's other campaign statements, threatened the loss of the 2002 ROAM bonus. Consequently, in reviewing the Board's action, we shall first consider its 2003 Order, finding violations of section 8(a)(1) and directing a second election. We will then consider whether the 2004 bargaining order was warranted.

A. Departing from Precedent

Cooper first argues that the Board erred in its 2003 Order by departing from its own precedent without explanation. Citing *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34 (1st Cir. 1989), Cooper maintains that the law is clear that an

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5. This Court cannot directly review the Board's ruling in a representation proceeding. *See NLRB v. V & S Schuler Eng'g, Inc.*, 309 F.3d 362, 367 n.5 (6th Cir. 2002). As a result, an employer seeking judicial review of election issues must first refuse to bargain with the victorious labor organization and then challenge the validity of the election in the ensuing unfair labor practice proceeding. *See id.*

agency cannot significantly depart from its own precedent without explicitly recognizing it is doing so and explaining why. *In Shaw's Supermarkets*, shortly before a union election, the employer told all employees that "if they were to turn their affairs over to" the union, they would be guaranteed "minimum wages and workmen's comp and that's where [the] collective bargaining process would begin." *Id.* at 34-35. Based on this statement, the Board refused to certify the results of the election and directed a second election. The Board moved for enforcement of its order. Citing several Board decisions finding that almost identical statements made under almost identical circumstances did not warrant a second election, the First Circuit reversed, holding that when the Board deviates "from well-established precedent as significantly as it has done here, it must, at least, explain the reasons for its deviation." *Id.* at 35.

Here, Cooper argues that the Board sustained the Union's objection and directed a second election based solely on its finding that an employee reasonably would have interpreted Question 22 as a threat to take away the 2002 ROAM bonus if the Union won the election. According to Cooper, as in *Shaw's Supermarkets*, under Board precedent, such a single, implied threat to eliminate an existing benefit was not sufficient to warrant a new election. We disagree.

Unlike *Shaw's Supermarkets*, there is no such clear line of contrary precedent governing this case.[6] In fact, contrary

6. The *Shaw's Supermarkets* court recognized the uniqueness of the case before it, however, indicating that it was limiting its decision to cases in which the Board departs from "past cases" which

(Cont'd)

to Cooper's claims, there is authority supporting the Board's finding that a single, implied threat of retaliation is sufficient to taint an election. In *Siemens Mfg. Co.*, 322 NLRB 994 (1997), for example, the Board, found that an employer's speech to employees reiterating the average wage increases and bonuses paid the previous five years, followed by a comment that if the employees voted to unionize, everything "is frozen until we reach an agreement at the negotiating table" was sufficiently coercive to taint the union election. *Id.* This Court also has held that a veiled threat of retaliation is sufficient evidence that an employer interfered with the employees' exercise of their rights in the context of a Union election. *See UFORMA/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1295 (6th Cir. 1997) (noting that the fact that the employer did not enforce its threat or otherwise engage in objectionable conduct does not shield it from liability, because "the threat itself is the actionable wrong"); *V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 279 (6th Cir. 1999) (noting that objectionable threats include insinuations by an employer that it will withhold or curtail a bonus or benefits in retaliation for unionization); *see also NLRB v. Island Film Processing* Co., 784 F.2d 1446, 1451 (9th Cir. 1986) ("Implied threats of retaliation suffice to taint an election.").

(Cont'd)

"trace a relatively clear line." *Id.* at 39. It was not imposing on the Board "the time consuming obligation of microscopically examining prior cases; nor [] encourag[ing] counsel to examine past precedent with an eye towards raising hosts of legalistic arguments and distinctions." *Id.*

Thus, the real issue in this case is not that the Board significantly departed from prior precedent but whether there was substantial evidence to support the Board's finding that Cooper's conduct violated Section 8(a)(1) of the Act.

B. Substantial Evidence

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [29 U.S.C. § 157]," which assures the right of employees "to bargain collectively through representatives of their own choosing." The test for determining whether an employer has violated section 8(a)(1) is "whether the employer's conduct tends to be coercive or tends to interfere with the employees' exercise of their rights." *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987). The party objecting to the election bears the burden of demonstrating that the employers' alleged conduct "interfered with the employees' free choice." *V & S Schuler Eng'g, Inc.*, 309 F.3d at 368; *see also Adair Standish Corp. v. NLRB*, 912 F.2d 854, 859 (6th Cir 1990) (quoting *Okun Bros. Shoe Store, Inc.*, 825 F.2d at 105) (noting that "'the total context in which the challenged conduct occurs' [is] viewed 'from the standpoint of its impact upon the employees'").

Here, Cooper argues that the Board erred in finding that its preelection conduct violated Section 8(a)(1). Specifically, Cooper claims that all of the statements contained in Question 22 were accurate and, read together, were not threatening or coercive but merely indicative of the uncertainty over the status of future bonuses should the employees vote to

unionize. It further asserts that the Board failed to read Question 22 in the context of the other statements in its memoranda and its verbal assurances that employees could "count on" receiving their 2002 ROAM bonus. Finally, Cooper contends that the Board improperly disregarded significant contrary testimony by two employees that directly refuted the Union's claims, impermissibly shifting the burden of proof from the Union to Cooper.

Our review of the Board's decision is "quite limited." *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 905 (6th Cir. 1997). "Where there is substantial evidence in the record as a whole to support the Board's conclusions, they may not be disturbed upon appeal." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). "Evidence is substantial when it is 'adequate, in a reasonable mind, to uphold the [Board's] decision.'" *V & S Schuler* Eng'g, *Inc.*, 309 F.3d at 367. In reviewing the Board's findings, we consider any contrary evidence but do not conduct a *de novo* review of the record. *NLRB v. Garon*, 738 F.2d 140, 141 (6th Cir. 1984) (noting that the Court is foreclosed from setting aside the Board's findings if they are supported by substantial evidence even though the Court may have reached a different conclusion had it originally decided the case). Thus, here, we must determine whether there is substantial evidence that Question 22, considered in the context of Cooper's other pre-election conduct, "tend[ed] to be coercive or tend[ed] to interfere with the employees' exercise of their rights." *Okun Bros. Shoe Store*, 825 F.2d at 105.

Appendix A

1. Question 22

Cooper argues that Question 22 was not threatening because it legitimately indicated mere uncertainty about the employees' receipt of future bonuses. However, as the Board found, it is the uncertainty cast upon the employees' receipt of a bonus to which they were already fully entitled that makes the statement coercive. As the Board explained, the 2002 ROAM bonus was earned as of December 31, 2002, and stood on very different footing from future bonuses. Nevertheless, Question 22 did not differentiate between the 2002 bonus and future bonuses. Instead, it asked without qualification whether employees "will . . . still be eligible for *the* ROAM bonus?" (emphasis added). Cooper's answer immediately following the question—namely, "I don't know"—again failed to distinguish between the 2002 ROAM bonus and future bonuses, thereby placing into doubt the employees' receipt of the bonus they had already earned. The remaining portions of the statement arguably reinforced the threatening implication that all ROAM bonuses, including the 2002 bonus, would be in jeopardy if the employees unionized. Cooper combined a statement linking eligibility for the bonus to the employees' union status—"Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program"—with statements concerning the timing and amount of the 2002 bonus. Cooper then emphasized that the 2002 bonus was a benefit of significant value, while noting that it would not be approved until after the election results were known. Viewed through the prism of an employees' economic dependence, *see Torbitt & Castleman*, 123 F.3d at 906, it is reasonable to conclude that "employees certainly could reasonably infer that the

bonus plan was contingent on their remaining nonunion." *Georgia-Pacific Corp.*, 325 NLRB 867, 867 (1998); *Advo Sys., Inc.*, 297 NLRB 926, 940 (1990) (holding that employer's answering question whether expected raises would be paid by saying "everything is negotiable" was objectionable when the employer knew that scheduled raises would be paid as scheduled).

2. Cooper's Memoranda and Verbal Assurances

The Board was not allowed to view Question 22 in isolation, though. Rather it was required to view this statement in the context of Cooper's other preelection activity. *See, e.g., Torbitt & Castleman*, 123 F.3d at 906. Cooper asserts that the Board failed to do so as it ignored Cooper's other statements in its campaign literature, including its unequivocal pronouncement that it could not remove existing benefits simply because of unionization, and its verbal assurances that the employees could "count on" receiving their 2002 ROAM bonus. Cooper maintains that the overriding theme of its preelection statements was the uncertain impact that the collective bargaining process might have on wages and benefits, *i.e.*, that future wages and benefits could go up, down, or remain the same.

With respect to the statements in the memoranda, the Board determined, however, that a reasonable employee would be more likely to be intimidated by the specific question about the ROAM bonus than to be assured by the other general statements that Cooper could not cut employees' wages or benefits simply because they voted to unionize. We believe that this is a reasonable interpretation of the

evidence, particularly given the content and the timing of the memoranda. *See generally Torbitt & Castleman*, 123 F.3d at 906 (holding that Board's reasonable interpretation will not be set aside even if reviewing court might have come to a different, more plausible, conclusion based on the evidence). Both memoranda were issued by Cooper in response to numerous questions it received from employees about the impending union election – including a specific question from at least one employee as to whether employees would still be eligible for the 2002 ROAM bonus. Instead of assuring employees that receipt of the 2002 bonus was not in jeopardy regardless of the election outcome, Cooper chose a much more ambiguous approach by asking a general question about the ROAM bonus and combining its answer as to future eligibility with specific information about the amount and timing of the 2002 bonus. The effect of this was, at the very least, to create confusion as to eligibility for the 2002 bonus, as illustrated by Cooper employee, James Schulze's testimony at the hearing that although he knew Cooper could not eliminate existing benefits, he interpreted Question 22 as "saying that if the union goes through that we may not be entitled to the bonus we already earned from the previous year." Furthermore, the January 27 memorandum was issued just days before the election, leaving little time for employees to clarify the apparently conflicting information. *See V &S Schuler Eng'g, Inc.*, 309 F.3d at 373 (noting that the Board must engage in closer scrutiny when the alleged unlawful actions occurred "on the doorstep of the election").

Cooper maintains, however, that even if Question 22 was ambiguous, Lemke's statement at the facility-wide meeting

held shortly before the election clearly indicated to the employees that the 2002 ROAM bonus would be paid regardless of the outcome of the election. When an employer makes a statement that would reasonably be viewed as an objectionable threat of retaliation, it may still cure or dispel the threat. In order to do so, however, the employer must, at a minimum, give employees a "clear assurance" that it will behave lawfully and will not follow through with the conduct threatened earlier. *See Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14, 2003 WL 21236331, at *2. Vague assurances of fair treatment or generalized statements that appear to contradict the earlier threat are insufficient to purge the coercive conduct. *See Noah's N.Y. Bagels*, 324 NLRB 266, 267 (1997) *see also Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1430 (2d Cir. 1996) (noting that conduct repudiating a threat must be "timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct").

It is unclear whether Lemke's meeting occurred before or after the distribution of the January 27 memorandum; it was an ineffective repudiation regardless. As the Board determined, if the facility-wide meeting occurred before January 27, the statements in the memorandum would call into doubt any representation by Lemke at the meeting. If the meeting occurred after distribution of the memorandum, it did nothing to dispel the coercive nature of Question 22. We agree with the Board that Lemke's statements at the meeting arguably served to reinforce the threat. That is, the statement may have heightened the coercive effect of the January 27 memorandum: highlighting the amount of the bonus and the fact that it would not be approved for

disbursement until after the results of the election were known. Although Cooper's Board of Directors' vote was only to approve the amount of the bonus that had already been earned, based on Cooper's ambiguous statements, the employees reasonably could have believed that the Board of Directors had the power to refuse to approve the bonus if they voted to unionize. *Cf. Adair Standish Corp.*, 912 F.2d 854 at 860.

3. Contrary Testimony by Cooper Employees

Finally, Cooper asserts that the sole basis of the Union's objection—that employees reasonably would have believed that Question 22 constituted an implied threat by Cooper to take away the 2002 ROAM bonus if the Union won the election—was expressly refuted by the only additional evidence presented by the Union at the hearing. That evidence was the testimony of James Schulze that he understood from Cooper's campaign literature that it could not eliminate any existing benefit simply because the employees voted in the Union, *see supra*, at 13. Thus, Cooper maintains that because the Union's evidence consisted solely of a single, alleged threat and the testimony of a witness who disclaimed the threat, Cooper must prevail if the burden of proof is to have any meaning. Cooper argues that the statement of its witness, Mark Rondomanski, that Lemke specifically told him that Cooper could not take away the 2002 ROAM bonus further undermines the Union's claim.

Cooper, however, confuses the issue of whether there was substantial evidence to support the Board's decision and who properly bore the burden of proof. As the hearing officer

and the Board explained, the appropriate "test is not whether the employee 'was in fact intimidated or coerced.'" *Torbitt & Castleman*, 123 F.3d at 907 (internal citations omitted). Instead, "the test to be applied is whether a remark can reasonably be interpreted by an employee as a threat." *Smithers Tire & Auto.* Testing *of Texas, Inc.*, 308 NLRB 72 (1992); *see also UFORMA/Shelby Bus. Forms*, 111 F.3d at 1294 ("'[T]he actual effect of a statement is not so important as its tendency to coerce.'") (citation omitted). In *Torbitt & Castleman*, for example, we held that the hearing officer did not err in concluding that an employer's statement had the tendency to coerce despite the testimony of an employee indicating that he was not in fact coerced. *Id.* at 907 (noting that "an employee's subjective reaction does not render the threat lawful or unlawful"). Similarly, in *Smithers Tire*, the Board determined that it was reasonable for an employee to construe a union official's remark that "[t]his is what happens when you cross us" as a threat, whether or not the employee actually construed it as such. *Id.* at 72.

Moreover, the Union presented additional evidence in support of its claims. In fact, despite Schulze's testimony that he did not believe Cooper could eliminate existing benefits, he stated that he interpreted Question 22 as "saying that if the union goes through that we may not be entitled to the bonus we already earned from the previous year." With respect to the testimony of Rondomanski that Lemke assured him, one-on-one, that employees would receive the 2002 bonus regardless of the vote outcome, the Board correctly observed that reliance on one employee's interpretation would be especially inappropriate where, as here, the outcome of the election could have been altered by a single vote.

The Board found Cooper's preelection conduct, specifically, its distribution of the January 27 memorandum that called into question the employees' receipt of the 2002 ROAM bonus if the employees voted to unionize, interfered with the results of the election. The Board had support for this finding. Thus, we will not disturb Board findings that Cooper violated Section 8(a)(1) of the Act. *See generally Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987) ("[T]he line between prediction and threat is a thin one, and in the field of labor relations that line is to be determined by context and the expertise of the Board.").

E. 2004 Order

Having concluded that substantial evidence supported the Board's finding that Cooper's preelection conduct violated Section 8(a)(1), we hold that Cooper failed to bargain with the Union in good faith after the Board certified the results of the properly ordered December 3, 2003 election, in violation of Section 8(a)(5). Accordingly, we DENY Cooper's petition for review of the Board's 2004 Order and GRANT the Board's cross-petition for enforcement.

Batchelder, J. dissenting. I respectfully dissent because, unlike the majority, I do not think that substantial evidence supports the NLRB's conclusion that the statements contained in Question #22 interfered with the employees' right to elect a labor union. In the days leading up to the election, Todd Lemke, the General Manager of Cooper's Cedar Rapids warehouse, prepared two question-and-answer style memoranda (dated January 17, 2003 and January 27, 2003) for distribution to the employees. The NLRB found

that the twenty-second question and answer in the second memo violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) by suggesting that management would not honor its commitment to pay the 2002 ROAM bonus if the employees agreed to unionize. This question and answer says:

> *QUESTION # 22*: If the [Union] gets in here, will we still be eligible for the ROAM bonus?
>
> *ANSWER*: I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program. Cooper expects to announce the amount of the ROAM bonus for this year early next month. Early indications show that the ROAM bonus looks very promising this year.

A union seeking to overturn the results of a representation election carries "the burden of showing that the election was not conducted fairly." *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988). "When preelection conduct is claimed to have made a representation unfair, the party seeking to overturn the election must show that unlawful acts interfered with employees' free choice and significantly affected the election results. The objector must show that the misconduct tended to prevent a fair election." *NLRB v. V& S Schuler Engineering, Inc.*, 309 F.3d 362, 368 (6th Cir. 2002). We review for substantial evidence the NLRB's conclusion that an election did not reflect the free and fair choice of the employees. *NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 285 (6th Cir. 1998) (quoting *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1155 (6th Cir. 1996)).

Appendix A

The majority holds that by failing to "differentiate between the 2002 bonus and future bonuses," Lemke's answer to Question #22 cast doubt on whether Cooper would honor the employees' right to the 2002 ROAM bonus, thereby influencing the election results in violation of Section 8(a)(1) of the NLRA. But the majority provides no reason why Lemke should make this distinction, and neither it nor the NLRB cites to language in the memo indicating that Question #22 pertained to the 2002 ROAM bonus (as opposed to future ROAM bonuses). Because the Union carries the burden of proving that the election was not conducted fairly, *Superior Coatings*, 839 F.2d at 1180, we are not permitted to simply assume that Question #22 referenced the 2002 ROAM bonus. To the contrary, the most reasonable interpretation of Question #22 is that it pertains only to *future* ROAM bonuses inasmuch as it uses the future tense verb "will." Had the writer of Question #22 intended to inquire about the 2002 ROAM bonus specifically, he likely would have asked "*are* we still eligible?"

Nor do I believe that Lemke's answer to Question #22, "I don't know," had any coercive effect. The majority's opinion assigns great significance to Answer #22's statement that unionized workers at other Cooper Tire facilities do not participate in the ROAM bonus program and that the bonus "looks very promising this year." Though nothing in the record casts doubt on the factual accuracy of this statement, the majority thinks that it "arguably reinforced the threatening implication that all ROAM bonuses, including the 2002 bonus, would be in jeopardy if the employees unionized." However, nothing in Answer #22 provides the necessary causational link between the election of the Union and the

revocation of the employees' 2002 bonuses. Though Answer #22 suggests that the employees' decision to unionize could ultimately *result* in their ineligibility to receive future ROAM bonuses, it contains no language to support the inference that Cooper would revoke the ROAM bonus *in retaliation for* the employees' decision to unionize.[1] Absent a link between ROAM eligibility and the employees' union status, Answer #22 may only be read as management's attempt to influence the outcome of the election by predicting that the workers at the Cedar Rapids plant, like their counterparts at other unionized Cooper facilities, would not obtain rights to receive the ROAM bonus through collective bargaining. Such predictions are entirely permissible. *Beverly Enterprises-Indiana, Inc.*, 281 NLRB 26, 31 (1986) ("an employer may attempt to influence the outcome of an election by presenting facts and even making predictions based on fact, as long as the employer avoids using its influence to interfere with employee rights of free association").

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1. The NLRB employed an erroneous legal standard in its failed attempt to link the possible revocation of the employees' 2002 ROAM bonus with their decision to elect a Union. *See First Healthcare Corp. v. N.L.R.B.*, 344 F.3d 523, 528 (6th Cir. 2003) ("[i]f the Board errs in determining the proper legal standard, the appellate court may refuse enforcement on the grounds that the order has no basis in law") (internal quotation omitted). The Board found that "[b]y emphasizing that none of Cooper's unionized workers participate in the ROAM bonus program, the Employer *might* have caused employees reasonably to believe that their receipt of the bonus was conditioned on their choosing to remain nonunion." (Emphasis added). The Union cannot sustain its burden of proof by establishing that a fact of consequence "might" have happened.

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The Board's decision is even less defensible when we consider the context in which Question # 22 was asked and answered. In the January 17 memo, Lemke stated that Cooper would not cut employee benefits simply because they elected a union and James Schulze, an employee at the Cedar Rapids warehouse who served as the Union's election observer, testified that he understood that it was illegal for employers to retaliate against employees who supported a union. Moreover, it is undisputed that the employees knew that their right to receive the 2002 ROAM bonus had vested a month before the election. It seems highly unlikely that an employee who knew that 1) he had a legal right to receive the ROAM bonus and 2) it is illegal for employers to retaliate against employees because they supported a union, would think that Question #22 pertained to the 2002 ROAM bonus and interpret Lemke's ambiguous answer as a threat.

Because substantial evidence does not support the NLRB's conclusion that the Union carried its burden of proving that Cooper Tire engaged in coercive conduct that interfered with the employees' exercise of their right to obtain union representation, I would reverse.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED MARCH 25, 2004

Cooper Tire & Rubber Company *and* International Brotherhood Of Electrical Workers, Local 1634.

Case 18-CA-17152

March 25, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding following a rerun election. Pursuant to a charge filed on January 13, 2004, the General Counsel issued the complaint on January 29, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 18-RC-17081. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 17, 2004, the General Counsel filed a Motion for Summary Judgment. On February 19, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On March 10, 2004, the Respondent filed a response.

Appendix B

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the ground that the Board erred in setting aside the initial election, based on the Union's objection, and directing a second election.[1]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.[2]

1. The Board's decision setting aside the initial election and ordering a rerun election is reported at 340 NLRB No. 108 (2003).

2. Chairman Battista dissented to the ordering of a second election in the underlying representation case and would have found that the Employer did not engage in objectionable conduct warranting a new election. 340 NLRB No. 108, slip op. at 3-4. While he remains of that view, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). In light of this, and for institutional reasons, he agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

Appendix B

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the manufacture, distribution and sale of tires at various facilities throughout the United States, including a facility located in Cedar Rapids, Iowa.

During the calendar year ending December 31, 2003, the Respondent, in conducting its business operations described above, purchased and received at its Cedar Rapids, Iowa facility goods and services valued in excess of $50,000 directly from sources located outside the State of Iowa, and sold and shipped goods and services valued in excess of $50,000 from its Cedar Rapids, Iowa facility directly to points located outside the State of Iowa.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Appendix B

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the second election held December 3, 2003, the Union was certified on December 10, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time warehouse employees employed at its warehouse located at 5405 Ely Road SW, Cedar Rapids, Iowa, but excluding office clerical employees, plant clerical employees, managers and guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since December 10, 2003, the Union has requested the Respondent to bargain, and, since January 13, 2004, the Respondent has refused. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

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CONCLUSION OF LAW

By refusing on and after January 13, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

Appendix B

ORDER

The National Labor Relations Board orders that the Respondent, Cooper Tire & Rubber Company, Cedar Rapids, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Electrical Workers, Local 1634, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time warehouse employees employed at its warehouse located at 5405 Ely Road SW, Cedar Rapids, Iowa, but excluding office clerical employees, plant clerical employees, managers and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Cedar Rapids, Iowa, copies of the attached notice

marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 13, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 25, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

3. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix B

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, Local 1634, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time warehouse employees employed at our warehouse located at 5405 Ely Road SW, Cedar Rapids, Iowa, but excluding office clerical employees, plant clerical employees, managers and guards and supervisors as defined in the Act.

COOPER TIRE & RUBBER COMPANY

APPENDIX C — DECISION AND DIRECTION OF SECOND ELECTION OF THE NATIONAL LABOR RELATIONS BOARD DATED OCTOBER 28, 2003

Cooper Tire & Rubber Company *and* International Brotherhood of Electrical Workers, Local 1634, AFL-CIO, Petitioner.

Case 18-RC-17081

October 28, 2003

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered the objection to an election held on January 31, 2003, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 6 against the Petitioner with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations, and finds that the election must be set aside and a new election held.

1. The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

Appendix C

The hearing officer found that the Employer engaged in objectionable conduct by threatening unit employees with a loss of benefits if they selected the Union as their bargaining representative. Specifically, the hearing officer found that the Employer interfered with the election when Distribution Center Manager Todd Lemke circulated a question and answer memorandum to employees on January 27, 2003, containing the following statement regarding employee eligibility for its ROAM bonus:[2]

> *QUESTION #22*: If the I.B.E.W. gets in here, will we still be eligible for the ROAM bonus?
>
> *ANSWER*: I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program. Cooper expects to announce the amount of the ROAM bonus for this year early next month. Early indications show that the ROAM bonus looks very promising this year.

Either before or after January 27, but clearly before the January 31 election, Lemke informed employees during a general meeting that the ROAM bonus would be 6.2 percent, subject to Board of Director approval. Lemke told employees that "you can count on 6-ish payable . . . mid-to late February."

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2. The ROAM bonus, part of a profit-sharing program, is calculated from the Employer's financial results in the preceding year and is typically granted to employees in mid to late February. The 2002 ROAM bonus was 6.2 percent of the employees' base salaries. In the previous 5 years, the bonus ranged from 1.38 to 3.65 percent.

Appendix C

The hearing officer found that the January 27 question and answer was objectionable because it reasonably would lead employees to believe that receipt of the 2002 bonus was in jeopardy if they selected union representation. The hearing officer rejected the Employer's arguments that employees reasonably would understand that this question and answer referred only to future bonuses (for 2003 and thereafter). The hearing officer found that "to a reasonable employee, the 2002 bonus was still a future bonus, too, because it hadn't been paid yet." Thus, even if, as argued by the Employer, employees knew that the 2002 bonus "accrued" as of December 31, 2002, the hearing officer found that they likewise would have known that it was contingent, until mid-February 2003 (after the election), on a vote of the board of directors.

The hearing officer further found that Lemke's statement to employees at the meeting about the ROAM bonus did not warrant a contrary result. The hearing officer concluded that if that meeting preceded the January 27 literature, the January 27 memo would have called into question Lemke's statement. Even if Lemke's statement postdated the question and answer, the hearing officer found that Lemke's statement did not clearly indicate that the bonus would be paid to the unit employees regardless of the results of the election.

Finally, the hearing officer found that although the Employer explicitly informed 1 unit employee that the 2002 ROAM bonus would be paid to employees regardless of the outcome of the election, this left the remaining 11 unit employees unclear as to what would happen, in circumstances where a single-vote shift could have affected the outcome of the election.

Appendix C

The Employer excepts, arguing that the January 27 question and answer merely conveyed a reasonable uncertainty as to whether the employees, through collective bargaining, would retain their *future* eligibility for the ROAM bonus program. The Employer contends that this meaning was evident to employees because eligibility for the 2002 bonus had already vested as of December 31, 2002.[3] The Employer further asserts that because other statements in the January 27 memo fairly described the bargaining process, employees reasonably would have understood that any reference to employees' eligibility for the ROAM bonus related to future years. Finally, the Employer argues that Lemke's subsequent announcement of "a 6-ish" ROAM bonus made clear that its prior question and answer addressed future bonuses, not the already earned 2002 bonus.[4]

We find no merit to these exceptions. For the reasons set forth by the hearing officer, we agree that the January 27 question and answer statement interfered with the election because it reasonably would lead employees to believe that receipt of the 2002 ROAM bonus was contingent on how they voted in the election.

---

3. Although board of director approval remained, the Employer asserts that such approval was applicable to all eligible employees (not merely those whom the Union sought to represent).

4. Although the Employer argues that Lemke's meeting with the employees occurred after the January 27 memo was distributed, the evidence conflicted on this point and the hearing officer specifically declined to determine the order of these two events.

Appendix C

It is well settled that an employer violates the Act by informing its employees that they will be automatically excluded from a benefit as soon as a union represents them. See, e.g., *Hertz Corp.*, 316 NLRB 672 (1995). Further, although it is permissible for an employer to tell its employees that all benefits will be negotiable and that existing benefits may be lost as a result of the bargaining process,[5] statements are objectionable when they effectively threaten loss of existing benefits and leave the employees with the impression that what they may ultimately receive depends in large measure upon what the union can induce the employer to restore. *Plastonics*, 233 NLRB 155 (1997). Finally, employer statements are objectionable where employees reasonably could infer from them that an existing benefit was contingent upon the employees remaining nonunion. *Georgia-Pacific Corp.*, 325 NLRB 867 (1998).

Applying this precedent, we find that the January 27 question and answer reasonably suggested to employees that they would be foreclosed from obtaining their 2002 ROAM bonus if the Union represented them. Thus, the language in this question and answer put in doubt the employees' eligibility for the ROAM bonus, and linked receipt of current and future bonuses to remaining nonunion, while simultaneously intimating that the 2002 ROAM bonus amount (for those eligible) looked very promising. In these circumstances—and particularly since the 2002 bonus was not payable until approved by the board of directors, and such approval would not occur until after the election—we find that the employees reasonably could infer that the receipt

5. See, e.g., *La-Z Boy*, 281 NLRB 338, 340 (1986).

of the ROAM bonus was contingent upon the work force remaining non-union.[6]

By emphasizing that none of Cooper's unionized workers participate in the ROAM bonus program, the Employer might have caused employees reasonably to believe that their receipt of the bonus was conditioned on their choosing to remain nonunion. In so doing, the Employer interfered with the employees' ability freely to choose whether or not they wished to be represented by the Union. Moreover, the Employer's failure to directly disavow or clarify the statement by explicitly informing employees that election of the Union would not result in the automatic loss of ROAM benefits only served to reinforce the threat. See *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14, slip op. at 2 (2003). Thus, contrary to the Employer, we find that Lemke's announcement of the 6.2 percent ROAM bonus to employees—unaccompanied by assurances that they would receive it regardless of the election outcome—was insufficient to clarify the January 27 statement.

We disagree with our dissenting colleague that the January 27 question and answer was merely a benign explanation of the ROAM bonus eligibility. Reasonably read, the statement is anything but benign. Employees reasonably

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6. We reject the Employer's argument that the objection must be overruled because the Union did not introduce evidence that unit employees believed that their 2002 ROAM bonus was contingent on the outcome of the election. The test is whether employees reasonably would believe that they could lose an existing benefit as a result of unionization, not the actual effect on the employees. *Smithers Tire*, 308 NLRB 72 (1992).

could view the statement as requiring them to choose between union representation and ROAM eligibility. We likewise reject the dissent's attempt to nullify the implicit threat in the question and answer by parsing out each statement contained in it and arguing that, since—considered separately—each statement is factually accurate and unobjectionable, the entire statement likewise must be unobjectionable. It is well settled that alleged threats must be considered in context. Here, that context is the Employer's direct linkage of the "very promising" 2002 ROAM bonus to claims of uncertainty that the employees would receive it, particularly pointing out that none of its represented employees were so entitled. Finally, we reject our dissenting colleague's argument—neither raised by the Employer nor supported in case law—that even if the question and answer reasonably could be understood as relating to the 2002 ROAM bonus, it was not objectionable because that bonus lawfully was subject to negotiations. As entitlement to that bonus had vested *prior* to the election, it was not a benefit that the Employer could thereafter threaten to eliminate or condition on the Union being able to bargain it back for the employees.

Accordingly, having found that the statement is objectionable, we shall set aside the election and direct that a new one be held.

Appendix C

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the notice of second election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have been discharged for cause since the payroll period, striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Brotherhood of Electrical Workers, Local Union 1634, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to

communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. October 28, 2003

Wilma B. Liebman	Member
Dennis P. Walsh	Member

Appendix C

CHAIRMAN BATTISTA, dissenting.

At issue in this case is whether the Employer interfered with the election by "notify[ing] all eligible voters on the week of the election that the [ROAM] bonus they had earned from the year 2002 may not be paid if the employees voted for Union representation." My colleagues adopt the hearing officer's findings that the Employer engaged in such objectionable conduct. I disagree.

As set forth in the record, the ROAM bonus is a long-established benefit that is calculated on an annual basis, vests at the end of each calendar year, and is paid out early the following year.

During the union organizing campaign, employees questioned the Employer about the effect union representation would have on their wages and benefits, including the ROAM bonus. For example, in mid-January, 2003, an employee asked Distribution Center Manager Lemke if employees would receive the 2002 ROAM bonus if the Union were voted in. Lemke responded that the employees would still receive that bonus as it was earned in 2002. In response to this and other questions, Lemke distributed a list of questions and answers to employees on January 27, 2003. Question and answer 22 on that list stated the following:

> *QUESTION #22*: If the I.B.E.W. gets in here, will we still be eligible for the ROAM bonus?
>
> *ANSWER*: I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program. Cooper expects to announce the amount of the ROAM bonus early next month. Early indications

show that the ROAM bonus looks very promising this year.

In its answer, the Employer was responding to the question of whether employees would remain eligible for the ROAM bonus if the Union won the election. As the 2002 bonus had already vested, this question related to future bonus years. This is further supported by the fact that the election was scheduled for January 31, 2003. Thus, this question referred to bonuses of 2003 and beyond.

In response to this question, Employer Representative Lemke correctly stated in his written answer that he did not know. Indeed, he could not know. The bonus for 2003 and beyond would depend on negotiations. If the Union were selected, that matter would be the subject of negotiations. And, the Employer correctly pointed out that negotiations at other unionized facilities had not resulted in a ROAM bonus.

By contrast, after indicating that he did not know about future years, Lemke directly spoke of the bonus for "this year," meaning 2002. That amount would be announced "early next month" (February) and looked "very promising." As recognized by the hearing officer, this was factually accurate and there is "nothing objectionable in the employer announcing the results of such a program as soon as it knows them."

This message was reinforced at a meeting held before the election. At that meeting, Lemke said that, for 2002, the employees "can count on" a bonus in the range of 6 percent. Although the final amount was subject to board of director approval, scheduled for February 2003, Lemke said nothing to suggest that such approval was contingent on the election results.

In sum, the employees reasonably understood that they definitely would receive a bonus for 2002, and that if the Union were selected future bonuses would not necessarily be given.

Further, even if it were assumed, arguendo, that the 2002 bonus was not a "done deal" until board of director approval, I would find that the Employer's statements were nonetheless privileged. If the Union won the election on January 31, the ROAM bonus would be subject to negotiations. That is, the Employer could place that open matter on the bargaining table, along with all other matters. Thus, the Employer would be correct to say that if the Union were chosen the 2002 bonus would be uncertain.

In sum, I find that the Employer's statements were factually and legally correct. They were therefore not objectionable.[1]

Dated, Washington, D.C. October 28, 2003

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

1. My colleagues, citing *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14 (2003), find that the Employer was obligated to clarify question and answer 22 so that employees reasonably would understand that their eligibility for the 2002 bonus was not dependent on their remaining nonunion. I disagree. I dissented from the majority opinion in *Yuma*. However, even under that majority view, I find that *Yuma* is distinguishable.

In *Yuma*, the employer stated that "with the union there is no 401(k)." Having made that definitive threat, the employer was under a duty to disavow it. By contrast, the Employer here made no such threat. It informed the employees that the 2002 bonus likely would be paid and that the 2003 bonus depended on negotiations if the Union were selected.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 7, 2006

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-1425/1590

COOPER TIRE & RUBBER COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ORDER

BEFORE: BATCHELDER and COLE, Circuit Judges; and OBERDORFER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

Appendix D

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
AUG 9 - 2006
OFFICE OF THE CLERK

(2)

No. 05-1425

In the Supreme Court of the United States

COOPER TIRE & RUBBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's campaign literature contained an objectionable threat to withhold an already-accrued annual bonus if the Union won the election, and thus warranted setting aside the election result and directing a second election.

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In the Supreme Court of the United States

No. 05-1425

COOPER TIRE & RUBBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 156 Fed. Appx. 760. The decision and order of the National Labor Relations Board (Pet. App. 25a-33a) is reported at 341 N.L.R.B. No. 64. The decision of the NLRB in the underlying representation proceeding setting aside the first election and directing a second election (Pet. App. 34a-45a), is reported at 340 N.L.R.B. 958.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2005. A petition for rehearing was denied on February 7, 2006 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on May 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a manufacturer of tires and other rubber equipment, operates a warehouse facility in Cedar Rapids, Iowa. Pet. App. 3a. As part of its employee profit-sharing program, petitioner maintains an annual program called the Return on Assets Managed, or "ROAM," bonus. The ROAM bonus is available to employees at several of petitioner's facilities, including those at the Cedar Rapids warehouse. Petitioner treats employees as having earned the bonus as of the last day of the year, but typically disburses the bonus to employees in the middle or end of the following February, when petitioner's board of directors approves the amount of the bonus. For the year ending on December 31, 2002, the board of directors in mid-February approved a ROAM bonus of 6.2% of the employees' base salary; in the five years preceding the 2002 ROAM bonus, the amount of the bonus ranged from 1.38% to 3.65%. *Id.* at 3a-4a.

On December 22, 2002, the International Brotherhood of Electrical Workers Local 1634 filed a petition to represent all full-time regular and part-time warehousemen at the Cedar Rapids facility. Pursuant to a stipulated election agreement, the National Labor Relations Board conducted an election, which was scheduled to take place on January 31, 2003. Pet. App. 4a.

Four days before the election, on January 27, petitioner circulated a memorandum to all voting employees stating its position on the upcoming election. Pet. App. 4a. The memo contained several statements in question-and-answer format, including the following regarding the ROAM bonus:

> Question 22: If the [Union] gets in here, will we still be eligible for the ROAM bonus?
>
> Answer: I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program. Cooper expects to announce the amount of the ROAM bonus for this year early next month. Early indications show that the ROAM bonus looks very promising this year.

Id. at 5a. At the time petitioner issued that statement, petitioner's board of directors had not yet approved the 2002 ROAM bonus amount, and the voting employees had not yet received their 2002 ROAM bonus. *Id.* at 5a-6a.

The election resulted in a tie vote—six employees voting for the Union and six against, with no challenged ballots—which failed to establish a majority in support of union representation. Pet. App. 6a. The Union filed an objection to the election, arguing that a new election should be held because petitioner's January 27 memorandum threatened employees with the loss of the 2002 ROAM bonus if they selected the Union as their representative. *Ibid.*

2. Following a hearing on the Union's objection, a Board hearing officer issued a report finding merit to the Union's objection. Pet. App. 36a. The hearing officer rejected petitioner's arguments that employees would have reasonably understood the statement in the January 27 memorandum as referring only to *future* bonuses (*i.e.*, those earned in 2003 and thereafter), rather than to *all* ROAM bonuses (including the 2002 bonus the employees had earned but not yet received). *Ibid.*

In exceptions to the hearing officer's report, filed with the Board, petitioner argued only (1) that the statement in the January 27 memorandum could not reasonably be construed in context as a threat that employees might lose the 2002 ROAM bonus, and (2) that petitioner's subsequent statements made clear that the memorandum did not refer to the 2002 ROAM bonus. Pet. App. 37a.

Rejecting petitioner's exceptions, the Board adopted the hearing officer's finding of employer interference and directed a second election. Pet. App. 34a-42a. The Board found that the language of the statement in the January 27 memorandum, when viewed in its entire context, "reasonably suggested to employees that they would be foreclosed from obtaining their 2002 ROAM bonus if the Union represented them," and that receipt of that bonus "was contingent upon the work force remaining non-union." *Id.* at 38a, 39a. In further agreement with the hearing officer, the Board concluded that petitioner did not cure or repudiate any implied threat regarding the employees' receipt of the 2002 ROAM bonus. *Id.* at 39a.[1]

3. The Union prevailed in the second election, conducted on December 3, 2003. Pet. App. 8a. In the absence of objections to that election, the Board's Regional Director certified the Union as the exclusive bargaining representative of petitioner's warehouse employees. *Id.* at 28a.

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[1] Chairman Battista dissented, on the basis that employees understood that they would receive the 2002 ROAM bonus, and that, even assuming that the 2002 bonus was not definite until the board of directors approved it, that bonus could be placed on the bargaining table. Pet. App. 43a-45a.

4. Petitioner refused the Union's request for bargaining, citing its disagreement with the Board's decision to set aside the initial election. Pet. App. 8a. Based on the Union's unfair labor practice charge, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 8a. Finding that all issues relevant to the unfair labor practice complaint were or could have been litigated in the representation proceeding, the Board granted the General Counsel's motion for summary judgment, found that petitioner's refusal to bargain with the Union violated the Act, and ordered petitioner to bargain with the Union. *Ibid.*; *id.* at 29a, 30a.

5. The court of appeals enforced the Board's order. Pet. App. 1a-24a. The court first rejected petitioner's argument based on *Shaw's Supermarkets, Inc.* v. *NLRB*, 884 F.2d 34 (1st Cir. 1989), that the Board had departed from precedent in holding that a single, implied threat to eliminate an existing benefit warranted a new election.[2] Pet. App. 9a-12a. The court then concluded that substantial evidence supported the Board's finding that petitioner engaged in objectionable conduct sufficient to taint the election. *Id.* at 12a-20a. The court upheld the Board's finding that petitioner's January 27 memorandum was coercive, because employees reasonably could have inferred that receipt of the 2002 ROAM bonus, which they had already earned, would be in jeopardy if employees unionized. *Id.* at 20a. Furthermore,

[2] In so doing, the court did not resolve the Board's contention that judicial review of petitioner's departure-from-precedent argument was jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. 160(e), because petitioner failed to raise that argument before the Board. See pp. 7-8, *infra*.

the court rejected petitioner's arguments that additional facts either detracted from the Board's valid finding of objectionable conduct or otherwise cured the taint of petitioner's conduct. *Id.* at 15a-20a.

Judge Batchelder dissented. Pet. App. 20a-24a. She concluded that the statement in petitioner's January 27 memorandum was a permissible prediction of the results of future collective bargaining, because the "most reasonable interpretation of [the statement] is that it pertains only to *future* ROAM bonuses." *Id.* at 22a (emphasis in original). Judge Batchelder did not address the majority's rejection of petitioner's argument based on the First Circuit's decision in *Shaw's Supermarkets*. *Id.* at 20a-24a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Relying on the First Circuit's decision in *Shaw's Supermarkets, Inc.* v. *NLRB*, *supra*, petitioner predicates its argument for review entirely on the assertion (Pet. 7-17) that the Board has developed two conflicting lines of precedent governing whether an employer's single, implied threat to "bargain from scratch" if the union is elected warrants setting aside an election lost by the union. Petitioner claims (Pet. 9-10, 14) that in *Shaw's Supermarkets*, the First Circuit identified a line of Board cases holding that such a single, implied threat is not objectionable or unlawful, but that the Board's decision here finding petitioner's conduct to be objectionable demonstrates that the Board has developed a conflicting line of precedent "governing materially identical situa-

tions where an employer makes a single implied 'bargaining from scratch' threat." Petitioner's argument should be rejected.

2. Initially, petitioner failed to make that argument to the Board, and therefore this Court cannot consider it. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has enforced that provision strictly, holding that Section 10(e) is jurisdictional, and that the failure to present an issue before the Board precludes subsequent judicial consideration of that issue. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982).

Here, in response to the hearing officer's report finding that petitioner's conduct was objectionable and had tainted the initial election, petitioner failed to assert any departure-from-precedent arguments in its exceptions to the Board. Instead, it made only factual arguments that its statement to employees referred to future ROAM bonuses and that, even if construed to refer to the 2002 benefits, its subsequent comments repudiated that construction.[3] Petitioner's submissions to the

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[3] Petitioner's exceptions to the Board were as follows:

1. The Hearing Officer['s] err[or] in shifting the burden of proof in this case from the Union to Cooper.

2. The Hearing Officer's conclusion that an eligible voter could reasonably interpret Cooper's statement in Q & A #22 of its January 27, 2003 memorandum that it doesn't know if employees will still be eligible for the ROAM bonus program if the union wins the election as threatening the loss of the 2002 ROAM bonus that the employees had already earned.

Board did not cite *Shaw's Supermarkets* or the Board decisions discussed by the First Circuit in *Shaw's Supermarkets*. Accordingly, the Court lacks jurisdiction to address the legal argument petitioner asserts as the sole basis for further review.

3. In any event, petitioner's argument that the Board's decision is part of a line of cases in conflict with *Shaw's Supermarkets* and the Board cases discussed therein is flawed, because the threat at issue here is neither the same as, nor "materially identical" to (Pet. 14), the "bargaining from scratch" statements addressed in *Shaw's Supermarkets*. As the Board found, this case involves a veiled threat by petitioner to withhold a benefit that had vested prior to the election if employees selected union representation, because petitioner's state-

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3. The Hearing Officer's conclusion that Cooper's statement in the January 17, 2003 and January 27, 2003 memoranda would not make clear to a reasonable, eligible voter that Q & A #22 concerned eligibility for future ROAM bonuses rather than threatened the loss of the 2002 ROAM bonus.

4. The Hearing Officer's conclusion that General Manager Todd Lemke's statement at the January 30, 2003 facility-wide meeting that employees could "count on" a 6.2% ROAM bonus for 2002 payable in mid to late February did not make clear to a reasonable, eligible voter that Q & A #22 concerned eligibility for future ROAM bonuses rather than threatened the loss of the 2002 ROAM bonus.

5. The Hearing Officer's refusal to find that General Manager Todd Lemke's statement that employees could "count on" a 6.2% ROAM bonus for 2002 payable in mid to late February constituted a repudiation of any previously implied threat in Q & A #22 that employees could lose the 2002 ROAM bonus that they had already earned.

C.A. App. 0134-0135 (citations omitted); see Pet. App. 37a.

ment conveyed that employees "would be *foreclosed* from obtaining their 2002 ROAM bonus if the Union represented them." Pet. App. 38a (emphasis added). Such a threat to withhold a benefit that had already vested has long been treated as unlawful and/or objectionable pre-election misconduct. See *Pearson Educ., Inc.* v. *NLRB*, 373 F.3d 127, 131-132 (D.C. Cir. 2004) (upholding the Board's conclusion that employer engaged in objectionable conduct by telling employees that announced wage increase in a specified amount would be lost if union won the election), cert. denied, 543 U.S. 1131 (2005); *Georgia-Pacific Corp.*, 325 N.L.R.B. 867, 867-868 (1998) (employer engaged in objectionable pre-election conduct by suggesting that employees would be foreclosed from bonus plan if they were represented by a union); *Bronx Metal Polishing Co., Inc.*, 268 N.L.R.B. 887, 890 (1984) (employer unlawfully coerced employees during unionization campaign by threatening to eliminate accrued vacation time); *Union Camp Corp.*, 202 N.L.R.B. 1023, 1023-1024 (1973) (employer's pre-election statement to employees implying that union's advent would mean deferral of accrued vacation benefits is objectionable).

By contrast, the employer conduct at issue in *Shaw's Supermarkets* and other cases cited by petitioner (Pet. 7-17) involved a materially different kind of alleged threat. Specifically, those cases concerned employer statements to employees that any bargaining following the selection of a union representative will begin from

"scratch,"[4] from "zero,"[5] or the like.[6] Such statements are different because, depending on the particular circumstances, they constitute either (1) permissible statements indicating that mere selection of a union will not automatically secure increased wages and benefits and that all such items are subject to bargaining; or (2) unlawful statements that, in context, convey that the employer will unilaterally discontinue existing benefits prior to negotiations or will adopt a regressive bargaining posture to penalize employees for selecting a union. See *NLRB* v. *General Fabrications Corp.*, 222 F.3d 218, 231 (6th Cir. 2000); *TRW-United Greenfield Div.* v. *NLRB*, 637 F.2d 410, 420-421 (5th Cir. 1981). As the Board recently stated, although employer statements during an organizing campaign that bargaining will start from "zero" or from "scratch"

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[4] *La-Z-Boy*, 281 N.L.R.B. 338, 339 (1986); *Mississippi Chem. Corp.*, 280 N.L.R.B. 413, 417 (1986); *Clark Equip. Co.*, 278 N.L.R.B. 498, 499 (1986); *Plastronics, Inc.*, 233 N.L.R.B. 155, 155 (1977); *Campbell Soup Co.*, 225 N.L.R.B. 222, 225 (1976); *Computer Peripherals, Inc.*, 215 N.L.R.B. 293, 293 (1974); *Wagner Indus. Prods. Co., Inc.*, 170 N.L.R.B. 1413, 1413 (1968).

[5] *Noah's Bay Area Bagels, LLC*, 331 N.L.R.B. 188, 188 (2000); *Histacount Corp.*, 278 N.L.R.B. 681, 686 (1986); *Belcher Towing Co.*, 265 N.L.R.B. 1258, 1260 (1982), enforced in relevant part, 726 F.2d 705 (11th Cir. 1984).

[6] *Exxon Research & Eng'g Co.* v. *NLRB*, 89 F.3d 228, 230 (5th Cir. 1996) (bargaining would begin with "a blank sheet of paper"); *Shaw's Supermarkets*, 884 F.2d at 35 (bargaining would "start with minimum wages and workmen's comp"); *Beverly Enterprises-Indiana, Inc.*, 281 N.L.R.B. 26, 29 (1986) (bargaining "starts out fresh"); *Ludwig Motor Corp.*, 222 N.L.R.B. 635, 635 (1976) ("[N]egotiation is going to start with a blank piece of paper."); *White Stag Mfg. Co.*, 219 N.L.R.B. 1246, 1248 (1975) ("Bargaining starts at what we call the bare table.").

> are not per se unlawful, the Board will examine them, in context, to determine whether they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore, or—conversely—whether they indicate that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining.

Federated Logistics & Operations, 340 N.L.R.B. 255, 255 (2003) (citations and quotation marks omitted), enforced, 400 F.3d 920 (D.C. Cir. 2005). See 1 *The Developing Labor Law* 135, 137-138 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001) (recognizing that the Board has identified "bargaining from scratch" statements as a "recurrent phrase[] used in election campaigns" that can be difficult to assess and depend on context and "totality of the circumstances").

Petitioner's threat clearly was not a "bargaining from scratch" statement. Unlike any of the cases on which petitioner relies, this case involves no statement to the effect that bargaining would begin "from scratch." Indeed, the 2002 ROAM bonus was not a benefit that petitioner could legitimately subject to the "normal give and take of collective bargaining." *Federated Logistics & Operations*, 340 N.L.R.B. at 255. Rather, as the Board explained, "[a]s entitlement to [the 2002 ROAM] bonus had vested *prior* to the election, it was not a benefit that [petitioner] could thereafter threaten to eliminate or condition on the Union being able to bargain it back for the employees." Pet. App. 40a; see *Pearson Educ.*, 373 F.3d at 132 ("A promised [benefit] must be

awarded even if a union wins an election."). In short, petitioner's threat did not implicate the analysis of *Shaw's Supermarkets* and the other cited "bargaining from scratch" cases, and, accordingly, petitioner's claim that the Board has developed conflicting authority is without basis.

4. For the same reason, petitioner's assertion (Pet. 17-22) of a circuit conflict is unfounded. Petitioner claims that the decision of the court of appeals conflicts with the decisions of the First Circuit in *Shaw's Supermarkets* and the Fifth Circuit in *Exxon Research & Engineering Co.* v. *NLRB*, 89 F.3d 228, 230 (5th Cir. 1996), which held that, in a context free of other unfair labor practices, an employer lawfully told employees that bargaining would begin with "a blank sheet of paper." As shown above, this case involves a threat to withhold an earned benefit, not a "bargaining from scratch" statement that, depending on the context, can be lawful. Accordingly, there is no direct conflict between those decisions and the court of appeals' decision in this case.[7]

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[7] Petitioner's claim of a circuit conflict is infirm for the additional reason that, when actually ruling on the legality of employers' "bargain from scratch" statements, Sixth Circuit decisions are consistent with the decisions of the First and Fifth Circuits. For example, in *NLRB* v. *St. Francis Healthcare Centre*, 212 F.3d 945 (6th Cir. 2000), the court concluded that an employer's statement that any negotiations with a union would start "from zero" or "from scratch" was a permissible prediction of hard bargaining, because the statement's timing and the union's ample opportunity to respond tended to negate any implication of coercion. *Id.* at 956-957. In *NLRB* v. *General Fabrications Corp.*, *supra*, the court agreed with the Board that an employer's statement that any bargaining would begin "at zero" was coercive because it was made in the context of other unfair labor practices and an overriding "atmosphere of anti-union animus." 222 F.3d at 230-231.

5. Finally, there is no conflict between the decisions below and any decision of this Court. Contrary to petitioner's claims (Pet. 27-28), the decisions below do not violate this Court's command in *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), that an agency decision "clearly set forth" the basis for any departure from prior norms "so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Id.* at 808. As demonstrated above, the *Shaw's Supermarkets* precedent from which petitioner claims the Board departed without explanation, and which petitioner did not even cite to the Board, does not apply to the misconduct at issue in this case.

Equally incorrect are petitioner's claims (Pet. 16, 24-25) that the Board and court of appeals decisions are in conflict with *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359 (1998). Although petitioner accuses the Board of "imped[ing] judicial review * * * by disguising its policymaking as factfinding," *id.* at 376, and of "applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced," *id.* at 374, those claims are based entirely on petitioner's erroneous assertion that the Board's decision here amounts to an unacknowledged development of conflicting lines of authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

COOPER TIRE & RUBBER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Board's Brief in this case does not address the issues posed by the Petition for Writ of Certiorari, i.e., that the Board departed from its own precedent and failed to explain its two conflicting lines of authority. Instead, the Board offers three arguments on unrelated or extraneous issues. One raises an issue considered and rejected by the Sixth Circuit Court of Appeals, i.e., that Cooper did not raise before the Board the issue it argues on appeal. The second two arguments attempt to distinguish the facts in *Cooper* by providing *post hoc* rationalizations for the Board's decision in this case.

The first argument was raised, considered and rejected by the Sixth Circuit which considered and ruled upon Cooper's arguments on the merits of the issue posed by Petitioner before this Court, i.e., the Board's two conflicting lines of authority where a single threat to eliminate benefits is unaccompanied by other objectionable conduct.

The second two arguments contain *post hoc* rationalizations for the Board's action in this case and may not be considered by the Court. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 85 S. Ct. 1061, 13 L. Ed. 2d 951 (1965). One argument suggests that a "bargaining from scratch" threat regarding multiple benefits was "a materially different kind of alleged threat" than a comparable threat involving only a single benefit as in *Cooper*. Such an attempt to distinguish *Cooper* from the other "bargaining from scratch" cases is not to be found in the Board's decision. The Board's second argument in its brief suffers from the same defect, i.e., its suggestion that whether a benefit had vested *prior* to the election distinguished the facts in *Cooper* from other "bargaining from scratch" cases. That also is nowhere to be found in the Board's decision.

The raising by the Board of three such weak arguments, of course, avoids addressing the merits of the issue posed by the Petition: The incompatibility between the Board's decisions in *Shaw's Supermarkets, Inc. v. NLRB.*, 884 F.2d 34 (1st Cir. 1989); *Exxon Research and Eng'g Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996); *Cooper*; and *Noah's Bay Area Bagels, LLC*, 331 N.L.R.B. 188 (2000), on the one hand, and the conflicting line of precedent in the eight NLRB cases analyzed by the First Circuit in *Shaw's Supermarkets*.

II. THE SIXTH CIRCUIT REJECTED THE BOARD'S ARGUMENT THAT COOPER DID NOT RAISE BEFORE THE BOARD THE ISSUE THAT THE DIRECTION OF A SECOND ELECTION BASED UPON A SINGLE IMPLIED THREAT WITH NO OTHER OBJECTIONABLE CONDUCT WAS INCONSISTENT WITH BOARD PRECEDENT

The Board raised before the Sixth Circuit the same argument that it does in this Court, i.e., that Cooper "failed to make that argument to the Board". That is not true. A review of the record demonstrates that Cooper, at each stage of the proceedings below, pointed out to the Board that the direction of a second election based upon a single, implied threat was not consistent with existing Board precedent.

The only thing that Cooper did not do before the Board was to tell the Board that it had departed from its own precedent. But Cooper, lacking clairvoyance, could *not* make that argument to the Board until the Board actually departed from its own precedent. Until that time, Cooper did all it could. It pointed out the correct precedent to the Board and asked the Board to follow it.

The Hearing Officer based his Recommendation directing a second election in this case on *Georgia-Pacific Corp.*, 325 NLRB 867 (1998) and *Advo Systems, Inc.*, 297 NLRB 926 (1990). (Hearing Officer's Report and Recommendation, at p. 7-8, Apx. p. 0129-30). Cooper, in its Exceptions to the Hearing Officer's Report filed on March 31, 2003, directly addressed the Hearing Officer's misuse of these precedents. Cooper pointed out that whereas *Georgia-Pacific* and *Advo Systems* involved explicit threats, the Hearing Officer recommended a second election based only upon an alleged implied threat in this case. (Exceptions to Hearing Officer's Report, p. 13 n.5 and p. 14 n.6, Apx. p. 0152, 0153).

In the Board's October 28, 2003 Decision affirming the Hearing Officer's Recommendation, Members Liebman and Walsh cited *Georgia-Pacific* and *Advo Systems* yet again in adopting the Hearing Officer's Recommendation for a second election. In addition, they cited *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14 (May 23, 2003), which had not been decided at the time Cooper filed its Exceptions, in support of their decision. (10/28/03 NLRB Decision, p. 2, Apx. p. 0008).

Cooper, in the Introduction to its final Brief to the Board below, expressly invited the Board to reconsider its earlier decision because "Chairman Battista had it right and Members Liebman and Walsh had it wrong" in the first Decision directing a Second Election. (Cooper's Brief in Opposition to the General Counsel's Motion for Summary Judgment, p. 1-2, Apx. p. 0194-5). In the body of the brief, Cooper again pointed out that one of the errors committed by the Board was finding Q&A #22 objectionable based upon the explicit threats at issue in *Georgia-Pacific*, *Advo Systems*, and *Yuma Coco-Cola Bottling*. Cooper expressly distinguished each of these cases again on the basis that Q&A #22 was alleged to be only a single, implied threat

rather than an explicit threat to eliminate a benefit. (*Id.* at p. 15 n.8 (*Georgia-Pacific*), Apx. p. 0208; p. 16 n.9 (*Advo Systems*), Apx. p. 0209; p. 20 (*Yuma Coca-Cola Bottling*), Apx. p. 0213).

Moreover, the Board specifically relied upon *Plastronics*, 233 NLRB 155 (1997) in rendering its decision in *Cooper*. That case involved multiple explicit threats to eliminate wages and benefits as compared to the single implied threat in both *Shaw's Supermarket* and *Cooper*. Cooper specifically distinguished *Plastronics* from the fact situation in its case before the Board on this ground.

Accordingly, Cooper pointed out the Board's departure from precedent at each stage of the proceedings below. That Cooper did so by distinguishing the instant case from established precedent addressing threats to eliminate an existing benefit does not mean that Cooper failed to argue that the NLRB "depart[ed] from precedent." Put simply, the Board could not be said to have departed from precedent until it, in fact, did so. To argue that Cooper should have specifically raised the Board's departure from precedent as a separate argument (rather than simply distinguishing the instant case from existing Board precedent involving threats to eliminate existing benefits) is to assume, wrongly, that the concerns of the Board and appellate courts are the same.

In fact, the principle that an agency explain the basis for departing from its own precedent emanates from the *courts* reviewing the agency's decisions, not the agency. This is because the rationale behind this principle is to permit the reviewing court to understand the basis of the agency's action and judge the consistency of that action with the agency's mandate. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita*

Board of Trade, 412 U.S. 800, 808-09 (1973). It would not have made sense, therefore, for Cooper to argue *before the Board* that the Board's departure from precedent warranted reversal of its decision directing a second election on the basis that a reviewing court would not be able to understand the basis for the Board ruling otherwise.

Structuring Cooper's argument in this manner, rather than simply distinguishing this case from the relevant precedent, could only be done in the context of raising this issue before an appellate court. Which is what Cooper did. Indeed, a review of the Sixth Circuit's decision in this case shows that the Court of Appeals considered on the merits Cooper's argument that the Board had departed from its own precedent like it had done in *Shaw's Supermarket* (Apx. p. 9A-12A).

III. APPELLATE COUNSEL'S *POST HOC* RATIONALIZATIONS FOR THE BOARD'S DECISION MAY NOT BE CONSIDERED

This Court held in *NLRB v. Metropolitan Life Insurance Co.* that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action" 380 U.S. at 444, citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-169 (1962). As the Court held, "[f]or reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process . . ." *Metropolitan*, 380 U.S. at 444.

Appellate counsel for the Board has advanced two *post hoc* rationalizations for the Board's decision which were not contained in the reasons and findings by the Board.

First, the Board's appellate counsel suggests that a single implicit "bargaining from scratch" threat to eliminate all existing benefits in *Shaw's Supermarket* was materially different from a single implicit "bargaining from scratch" threat to eliminate one existing benefit in *Cooper*.

But the Board never made such a distinction in its decision. Indeed, the Board specifically relied on *Plastronics*, 233 NLRB 155 (1997) which involved multiple, explicit "bargaining from scratch" threats to eliminate all existing benefits. It made no effort to distinguish the fact situation in *Plastronics* from the facts in *Cooper*, which involved one implicit "bargaining from scratch" threat to eliminate a single benefit.

Second, appellate counsel argues that the benefit Cooper allegedly threatened to eliminate was already vested and that this distinguishes *Cooper* from *Shaw's Supermarket*. Yet the Board made no reference to a "vested" benefit which the employees had already earned as a relevant factor in its decision. To the contrary, the Hearing Officer's opinion, adopted by the Board, specifically held that: "to a reasonable employee, the 2002 bonus was still a *future* bonus, because it had not been paid yet." (Appendix C, pg. 36A.) (Emphasis added.)

The plain fact is that an implied "bargaining from scratch" threat to eliminate all existing benefits as in *Shaw's Supermarket* does not involve "a materially different kind of alleged threat" from an implied threat to eliminate a single benefit (as in *Cooper*) like the Board claims in its Brief. (Page 9.) It is simply not true, as the Board claims in its Brief at page 11, that "unlike any of the cases on which Petitioner relies, this case involves no statement to the effect that

bargaining would begin from scratch." Threatening to take away a benefit to be paid in the future is, by definition, a threat to "bargain from scratch", i.e., it will not be paid unless the Company agrees with the Union to do so.

IV. THE BOARD CONTINUES TO AVOID EXPLAINING WHY THE FIRST CIRCUIT'S ANALYSIS IN *SHAW'S SUPERMARKET* IS INCORRECT

The Board continues to evade the analysis articulated by the First Circuit in *Shaw's Supermarket*. Indeed, the Board continues to consider its own decision in *Shaw's Supermarket* to be good law as exemplified by its decision in *Exxon Research*, 89 F.3d 228 (5th Cir. 1996), its reaffirmation of those two decisions in *Noah's Bay Area Bagels*, 331 N.L.R.B. 188 (2000), and its decision in *Cooper*. None of those cases suggest that a single implied threat to eliminate a single benefit is "a materially different kind of alleged threat than an implied threat to eliminate all existing benefits." The fact is that in *Shaw's Supermarket* as in *Exxon* and in *Cooper*, the single implied threat to eliminate one or more benefits was unaccompanied by any other objectionable conduct and that is a material departure from the eight cases analyzed by the First Circuit in *Shaw's Supermarket*. The NLRB resolutely continues to refuse to explain why it did so. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 37 L. Ed. 2d 350, 93 S. Ct. 2367 (1973) was intended to prevent this.

How long will the NLRB continue to evade the question posed by the First Circuit in *Shaw's Supermarkets*, i.e., that, prior to 1989, NLRB precedent was clear that a single implied threat to eliminate benefits made during a Union election

campaign, unaccompanied by other unlawful conduct, was not unlawful or sufficient to overturn the results of an election? The Board in its Brief to this Court does not dispute that the fact situation in *Cooper* involved an implied threat to eliminate an existing benefit with no other objectionable conduct. This was the issue addressed by the First Circuit in *Shaw's Supermarket* when it analyzed the conflicting lines of authority.

The very cases cited by the NLRB in its decision in *Cooper* directing a Second Election all involved either multiple threats to eliminate benefits or a single threat accompanied by other objectionable conduct. *Hertz Corp.*, 316 NLRB 672 (1995) (threat with other objectionable conduct); *Advo Systems, Inc.*, 297 NLRB 926 (1990) (threat with other conduct); *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14 (2003) (direct threat followed by multiple implied threats); *Plastronics*, 233 NLRB 155 (1997) (multiple unequivocal threats); *Georgia-Pacific Corp.*, 325 NLRB 867 (1998) (multiple unequivocal threats).

The eight cases analyzed in *Shaw's Supermarket* are in direct contrast to the cases cited in the preceding paragraph. As in *Shaw's Supermarket*, *Exxon Research*, and *Cooper*, those eight cases all involved single implied threats to eliminate existing benefits unaccompanied by any other objectionable conduct. *Atchison* requires the Board to explain these conflicting lines of authority. It should. In the words of the Fifth Circuit in *NLRB v. International Union of Operating Engineers, Local 925*, 460 F.2d, 589, 604 (5th Cir. 1972), "An inadequately explained departure solely for purposes of a particular case, or the creation of conflicting lines of precedence in governing the identical situation, is not to be tolerated".

CONCLUSION

For these reasons, Cooper respectfully requests that its Petition be granted.

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